

No. 98-1037-CFH

Title: George Smith, Warden, Petitioner  
v.  
Lee Robbins

Docketed:  
December 29, 1998

Court: United States Court of Appeals for  
the Ninth Circuit

Entry Date

Proceedings and Orders

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Dec 17 1998	Petition for writ of certiorari filed. (Response due January 28, 1999)
Jan 28 1999	Brief of respondent Lee Robbins in opposition filed.
Jan 28 1999	Motion of respondent for leave to proceed in forma pauperis filed.
Jan 29 1999	Brief amicus curiae of California Academy of Appellate Lawyers filed.
Feb 2 1999	Reply brief of petitioner Smith, Warden filed.
Feb 10 1999	DISTRIBUTED. February 26, 1999
Mar 1 1999	REDISTRIBUTED. March 5, 1999
Mar 8 1999	Motion of respondent for leave to proceed in forma pauperis GRANTED.
Mar 8 1999	Petition GRANTED.
	SET FOR ARGUMENT October 5, 1999.
	*****
Apr 21 1999	Motion of respondent for appointment of counsel filed.
Apr 21 1999	Brief amicus curiae of Criminal Justice Foundation filed.
Apr 22 1999	Joint appendix filed.
Apr 22 1999	Brief of petitioner George Smith, Warden filed.
Apr 22 1999	Brief amicus curiae of California Academy of Appellate Lawyers filed.
Apr 22 1999	Brief amici curiae of Arizona, et al. filed.
Apr 27 1999	DISTRIBUTED. May 13, 1999 (Page 18)
May 11 1999	Order extending time to file brief of respondent on the merits until June 21, 1999.
May 17 1999	Motion for appointment of counsel GRANTED and it is ordered that Ronald J. Nessim, Esquire, of Los Angeles, California, is appointed to serve as counsel for the respondent in this case.
Jun 16 1999	Brief of respondent Lee Robbins (TBP) filed.
Jun 21 1999	Brief amici curiae of Retired Justices Armand Arabian, et al. filed.
Jun 21 1999	Brief of respondent Lee Robbins filed.
Jun 21 1999	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Jun 21 1999	Brief amicus curiae of Jesus Garcia Delgado filed.
Jun 24 1999	Respondent's various materials lodged.
Jul 1 1999	Application (99A26) to file a petitioner's reply brief on the merits in excess of page limits, submitted to Justice O'Connor.
Jul 2 1999	Motion of petitioner to strike lodged materials filed.
Jul 6 1999	Application (99A26) denied by Justice O'Connor.
Jul 12 1999	Opposition to motion to strike filed.
Jul 20 1999	Reply brief of petitioner to respondent's opposition to motion to strike filed.
Jul 21 1999	DISTRIBUTED. September 27, 1999 (Page 64)

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Entry     Date

Proceedings and Orders

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Aug 17 1999	CIRCULATED.
Sep 24 1999	Record filed.
Sep 29 1999	Record filed.
Oct 4 1999	Motion of petitioner to strike lodged materials DENIED. except that the uncertified transcript of the argument before the Ninth Circuit is stricken.
Oct 5 1999	ARGUED.



FILED

DEC 17 1998

OFFICE OF THE CLERK

No. 98-1037

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IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1998

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GEORGE SMITH, Warden, *Petitioner*,

v.

LEE ROBBINS, *Respondent*.

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ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

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**QUESTIONS PRESENTED**

In *Anders v. California*, 386 U.S. 738 (1967), this Court held that an indigent criminal appellant could not be denied representation on appeal based on appointed counsel's bare assertion that there was no merit to the appeal. In California, approximately 20 percent of criminal appeals result in the filing of no-merit briefs on behalf of indigent appellants.

1. Did the Ninth Circuit err in finding that California's no-merit brief procedure -- in which appellate counsel who has found no nonfrivolous issues remains available to brief any issues the appellate court might identify -- violated the Sixth Amendment *Anders* right to effective assistance of counsel on appeal?

2. Did the Ninth Circuit err when it ruled that the asserted *Anders* violation required a new appeal, without testing the claimed Sixth Amendment error under *Strickland v. Washington*, 466 U.S. 668 (1984)?

3. Did the Ninth Circuit violate the rule announced in *Teague v. Lane*, 489 U.S. 288 (1989), which prohibits the retroactive application of a new rule on collateral review, when it invalidated California's well-settled, good-faith interpretation of federal law?

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**IN THE SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1998

No. \_\_\_\_\_

GEORGE SMITH, Warden, *Petitioner*,

v.

LEE ROBBINS, *Respondent*.**PETITION FOR WRIT OF CERTIORARI**

Petitioner George Smith, Warden ("the Warden") respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

The amended opinion of the United States Court of Appeals appears at Appendix A to the petition and is reported at 152 F.3d 1062 (CA9 1998). The original opinion appears at Appendix B and is reported at 125 F.3d 831 (CA9 1997).

The unreported opinion of the United States District Court appears at Appendix C to the petition. The California Supreme Court's denial orders appear at Appendix D. The California Court of Appeal's unreported affirmance of the prisoner's conviction can be found at Appendix E.



### JURISDICTION

The United States Court of Appeals issued an amended opinion on August 13, 1998, and denied the Warden's petition for rehearing on September 24, 1998. This Petition for Writ of Certiorari follows within 90 days. The Warden invokes the jurisdiction of this Court under 28 U.S.C. §1254(1).

### CONSTITUTIONAL PROVISIONS

The Sixth Amendment of the United States Constitution provides, in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

### STATUTORY PROVISIONS

Section 2254 of Title 28 of the United States Code provides in pertinent part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

### STATEMENT OF THE CASE

On December 31, 1988, Robbins shot and killed his former roommate. When he became the focus of the police investigation, Robbins fled in a stolen truck. He was later arrested in Arkansas.

After a trial by jury in Los Angeles Superior Court, Robbins, who had served as his own counsel, was found guilty of second degree murder with personal firearm use and grand theft auto. On September 5, 1990, he was sentenced to state prison for 17 years to life.

Court-appointed counsel on appeal found no nonfrivolous issues to assert and filed a no-merit ("*Wende*") brief setting forth the procedural history and a statement of facts with references to the record and requesting that the California Court of Appeal conduct an independent review of the record. Appendix G; *People v. Wende*, 25 Cal. 3d 436, 158 Cal. Rptr. 839 (Cal. 1979). In an attached declaration counsel averred that he had reviewed the entire record, discussed the case with trial counsel and informed Robbins of his right to request counsel's removal and to file a supplemental brief in propria persona. Appendix G. Robbins then filed a brief on his own behalf, claiming insufficient evidence and due process denial based on the prosecutor's suppression of exculpatory evidence.

On December 12, 1991, after independently examining the record, the appellate court made three findings: that Robbins's counsel had fulfilled his responsibilities, that the record did not support the issues Robbins had raised, and that no arguable issues existed. Appendix E. The California Supreme Court denied Robbins's petition for review.

In late 1992, Robbins filed a federal habeas corpus petition, which was dismissed without prejudice to permit him to exhaust state remedies. On June 11, 1993, Robbins filed a habeas corpus petition in the California Supreme Court, asserting *inter alia* that appellate counsel provided ineffective assistance by filing a no-merit brief. On September 29, 1993, the State Supreme Court denied his petition on the merits.

On February 24, 1994, Robbins filed a federal petition for writ of habeas corpus, alleging ineffective

assistance of counsel for filing a no-merit brief when there were nonfrivolous issues to be raised. In response to the court's order, the Warden filed a return, and Robbins filed a traverse.

On September 8, 1994, the court appointed counsel to represent Robbins and ordered the parties to file supplemental briefing. On October 24, 1995, the district court conditionally granted Robbins's petition for writ of habeas corpus on the ground that appellate counsel was ineffective for failing to meet the standards of *Anders v. California*, 386 U.S. 738 (1967) and ordered Robbins discharged from custody unless the California Court of Appeal accepted jurisdiction over Robbins's direct appeal within 30 days. Appendix C. Both the Warden and Robbins filed notices of appeal.

A Ninth Circuit panel issued a published affirmance, holding that state appellate counsel, who had complied with the state's no-merit procedure, had not complied with the requirements of *Anders*. *Robbins v. Smith*, 125 F.3d 831, amended in 152 F.3d 1062; Appendices A, B.

The panel denied the Warden's petition for rehearing and rejected the suggestion for rehearing en banc but granted the Warden's motions to stay the mandate pending the filing of this petition for writ of certiorari. Appendix F.

## REASONS FOR GRANTING THE WRIT

### **THE NINTH CIRCUIT'S IMPROPER RETROACTIVE DEMOLITION OF CALIFORNIA'S NO-MERIT-BRIEF PROCEDURE PORTENDS A SEISMIC DISRUPTION IN THE ADMINISTRATION OF JUSTICE IN THE NATION'S MOST POPULOUS STATE**

On May 8, 1967, in *Anders v. California*, this Court invalidated California's no-merit letter procedure for indigent criminal appeals. The Court found that counsel's bare no-merit conclusion, without a finding that an appeal would be frivolous, was an inadequate substitute for counsel's acting in the role of a vigorous advocate on behalf of his indigent client. 386 U.S. 738, 741-42.

Five months later, the California Supreme Court construed and applied *Anders*, finding that a no-merit letter no longer sufficed when counsel could find no arguable issues. *People v. Feggans*, 67 Cal. 2d 444, 447-48, 62 Cal. Rptr. 2d 444 (Cal. 1967). Instead, counsel was required to prepare a brief to assist the court in understanding the facts and legal issues. The brief was to include a statement of facts with citations to the record, a discussion of the legal issues with citations to authority and argument of all arguable issues. *Id.* at 447. If counsel concluded the appeal was frivolous, he could ask to withdraw but would not be permitted to do so until the appellate court was satisfied that he had discharged his duty to his client and the court to provide a statement of the facts and legal issues. *Id.* If counsel withdrew, the appellant was to be given the opportunity to file a brief in propria persona, after which the court was to decide for itself whether the appeal was frivolous. *Id.* If any claim was "reasonably arguable," regardless of how the court



believed it would be resolved, the court was obligated to appoint new counsel to argue the appeal. *Id.* at 448.

Twelve years later, in 1979, the California high court refined the state procedure. *People v. Wende*, 25 Cal. 3d at 441-42. The State Supreme Court found that *Anders* was intended to increase protections for indigent no-merit appellants. *Id.* at 441. Accordingly, the reviewing court was required, after reviewing the record, to determine whether the case was wholly frivolous. *Id.* The *Wende* court adopted the *Anders* determination that a brief by counsel was a great improvement over a no-merit letter, because the brief assisted the court by referring to the trial record and legal authorities. *Id.* The court found that neither *Anders* nor *Feggans* required counsel to state explicitly that he had found no arguable issues, because his failure to identify arguable issues could be inferred from his failure to raise any. *Id.* at 442. Counsel did not have to withdraw if he informed his client of the client's right to have him relieved and had not disabled himself by describing the appeal as frivolous. *Id.* The *Wende* court concluded that the filing of a no-merit brief required the appellate court to make an independent review of the record, even if the appellant did not submit a brief in propria persona. *Id.* at 441-442. The court acknowledged that counsel's filing of a no-merit brief might ultimately secure the indigent client a more complete review than the client might receive after a merits brief had been filed. *Id.* at 442.

Over the years, there has been no direct constitutional challenge to the holdings of *Feggans* and *Wende*. Consequently, reasonable California jurists have relied for decades on *Feggans* and *Wende* as correct state-law formulations of the federal constitutional requirements addressed in *Anders*. There has been no reason to question their viability.

In 1997, a three-judge panel (Hug, C.J., with Pregerson and Reinhardt, JJ.) of the Ninth Circuit held

that the *Wende* brief filed on Robbins's behalf did not comply with *Anders* and *Feggans*. Appendix A. The Ninth Circuit's revelation came on collateral review, in a case in which the panel slighted this Court's jurisprudence by deciding the *Teague* point last and without even pretending to survey the legal landscape to determine whether "[the] state court, at the time the conviction or sentence became final, would have acted objectively unreasonably by not extending the relief later sought in federal court." *O'Dell v. Netherland*, 521 U.S. 151, 117 S. Ct. 1969, 1973 (1997).

The Ninth Circuit's decision is wrong for three separate reasons. First, California's procedure meets the essential criteria of *Anders v. California*. Second, even though Robbins was never denied counsel, the Ninth Circuit improperly found the asserted error to be prejudicial per se, rather than requiring Robbins to show prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). And third, the panel's opinion violates the anti-retroactivity rule of *Teague v. Lane*, 489 U.S. 288 (1989).

A substantial percentage of California's criminal appellate caseload is affected by the Ninth Circuit's decision. In fiscal 1996-97, appellate counsel filed 7,774 opening briefs in direct California criminal and juvenile appeals.<sup>1</sup> Assuming that a previously established ratio of no-merit to merits briefs held true<sup>2</sup>, 20 to 24 percent of the total number of criminal appeals were no-merit briefs filed on behalf of indigent appellants, for a state-wide total of more than 1,500 no-merit briefs in that year alone.

Given that scale, the Ninth Circuit's improper retroactive invalidation of California's no-merit brief

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1. 1998 Annual Statistical Report of the Judicial Council of California.

2. *People v. Hackett*, 36 Cal. App. 4th 1297, 1304 n.4, 43 Cal. Rptr. 2d 219 (1995).

procedure threatens to work a grievous hardship on the administration of justice in the nation's largest state. In short, this case does not present just another Ninth Circuit misapplication of *Anders*, *Strickland* and *Teague*. By improperly threatening to dismantle California's no-merit procedure on collateral review, the Ninth Circuit has needlessly jeopardized the finality of thousands of California cases.

## ARGUMENT

### I.

**The Ninth Circuit erred in finding that California's no-merit brief procedure violated the Sixth Amendment right to effective assistance of counsel on appeal**

Petitioner contended that he was denied effective assistance of appellate counsel by virtue of counsel's filing a no-merit brief. In a published decision filed on September 23, 1997, and amended on August 13, 1998, the Ninth Circuit panel demolished California's decades-old *Wende* brief procedure. The panel's decision was fundamentally wrong. California's procedure provides greater protections for indigent appellants than the federal Constitution requires. It more than meets the requirements of *Anders*.

In 1985, the California Judicial Council adopted Rule 76.5 of the California Rules of Court. *People v. Hackett*, 36 Cal. App. 4th at 1311. The rule required the state courts of appeal to evaluate the qualifications of appointed counsel so that the attorney's skill corresponded to the length and complexity of the case and authorized the courts to delegate this responsibility to an administrator who had "substantial experience in handling criminal appeals." *Id.* The task has been delegated to five appellate project administrators and their "able and experienced [staff] lawyers."<sup>3</sup> If appointed counsel cannot find any non-frivolous issues, the supervising appellate project attorney searches the record again before authorizing the filing of a no-merit brief. *Id.* And, finally, the court conducts its own independent review. *Id.* In practice, this means that in California an indigent

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3. The California Appellate Project/Los Angeles (CAP/LA) supervised and reviewed the instant case.

*Anders* appellant is given two independent reviews by counsel and one by the court of appeal. By way of contrast, a defendant represented by retained counsel or appointed counsel filing a merits brief would be entitled to have only his counsel's independent evaluation of the record.

In *Anders v. California*, this Court held "that a criminal appellant may not be denied representation on appeal based on appointed counsel's bare assertion that he or she is of the opinion that there is no merit to the appeal." *Penson v. Ohio*, 488 U.S. 75, 80 (1988). The *Anders* Court acknowledged that an attorney may withdraw without denying the appellant counsel if the withdrawal is preceded by certain safeguards. *Penson*, 488 U.S. at 80. If, after conscientiously examining the record, counsel concludes that the case is wholly frivolous, he may seek leave to withdraw, accompanying his request with a brief which refers to anything in the record which might arguably support an appeal. *Id.* When it receives a no-merit brief, the appellate court has the duty to conduct its own independent examination of the record to see if any nonfrivolous issues exist. If the court agrees with counsel's assessment, it may determine the appeal on the merits without assistance from counsel. *Id.* However, the court is obliged to appoint counsel to argue the appeal if it finds nonfrivolous issues which might be raised. *Id.*

The rule in *Anders* has led to the filing of some strange legal documents, including the "schizophrenic" opening brief in *McCoy v. Court of Appeals of Wisconsin*. *McCoy*, 486 U.S. 429, 432 (1988). This Court held in *McCoy* that appointed counsel's motion to withdraw on grounds that an appeal would be frivolous does not mean that an indigent defendant has been given less effective representation than one who is represented by retained counsel. *Id.* at 437, 438. What *Anders* guarantees an indigent defendant is "a diligent and thorough review of the record and an identification of any arguable issues

revealed by that review." *McCoy*, 486 U.S. at 439. This Court noted that the no-merit brief was not envisioned as a substitute for an advocate's brief on the merits. Instead, the no-merit brief was designed to assist the court in deciding whether the appeal was so frivolous that the criminal appellant did not have a federal constitutional right to counsel. *McCoy*, 486 U.S. at 439-40 n.13.

Thus, the appropriate question for the Ninth Circuit to have asked is whether the state procedure under consideration "is consistent with [the Supreme Court's] holding in *Anders*." *Id.* at 440. The panel decided that it was not. The finding was erroneous.

The California Supreme Court first construed *Anders* in 1967 in *People v. Feggans*, 67 Cal. 2d 444, and further distilled its interpretation in 1979 in *People v. Wende*, 25 Cal. 3d 436. Under those two cases, an indigent California criminal appellant has a right to a brief setting forth a statement of the case and a statement of facts with citations to the transcript, along with counsel's argument in a merits brief of any issues which are arguable. *Wende*, 25 Cal. 3d at 440. If counsel cannot find any nonfrivolous issues to assert, he may limit his brief to a statement of the case and of the facts, a request that the court independently review the record, and an accompanying declaration stating that he has notified his client that the client may seek counsel's removal and may file his own brief in propria persona. *Id.*; *Feggans*, 67 Cal. 2d at 447. Counsel may not argue the case against his client. *Wende*, 25 Cal. 3d at 440. After receiving the brief filed by counsel and considering the brief the appellant might submit, the court must make its own independent review of the record to decide whether the appeal is frivolous. *Wende*, 25 Cal. 3d at 440-42; *Feggans*, 67 Cal. 2d at 447-48. If the court believes that any contention which has been raised is reasonably arguable, it must provide counsel to represent appellant. *Wende*, 25 Cal. 3d at 440; *Feggans*, 67 Cal. 2d at 448.



The California Supreme Court held that *Anders* does not require counsel to state that he has examined the record, found no arguable issues, concluded an appeal would be frivolous and wishes to withdraw. *Wende*, 25 Cal. 3d 442. Counsel's inability to find arguable issues can be inferred from his failure to raise any. *Id.* Nor is it incumbent on counsel to seek to withdraw, so long as he has not disabled himself by describing the case as frivolous. *Id.* The *Wende* court noted there are practical benefits to both court and client from counsel's remaining on the case and found it proper for counsel to remain, so long as he has informed his client of the client's right to request that counsel be relieved and has not called the appeal frivolous. *Id.* The appellate attorney who files a no-merit brief may obtain a more complete review for his client by being unable to identify any nonfrivolous issues than by raising issues, because the court independently reviews the entire record when a no-merit brief is filed. *Id.* at 442.

Petitioner's state appellate counsel filed a brief which meets the mandate of *Anders*, as applied in *Feggans* and *Wende*. Appendix G. The brief contained a two-page statement of the case and a detailed six-page statement of facts, with references to the record, from which the reviewing court could ascertain that counsel had searched the record. *Id.* In addition, counsel requested that the court independently examine the record:

Pursuant to *People v. Wende* (1979) 25 Cal. 3d 436, counsel requests that this court independently review the entire record on appeal for arguable issues.

Present counsel has advised appellant that appellant may file a supplemental brief with the court within 30 days and may request the court to relieve present counsel. Present counsel remains available to brief any issue(s) upon invitation of the court.

In his state-court declaration in support of the request for an independent review, counsel stated he had reviewed the entire record on appeal, examined the superior court file and exhibits and discussed the case with trial counsel. Appendix G. The attorney also wrote to petitioner, explaining his evaluation of the appellate record and his intention to file a no-merit brief. *Id.* Counsel informed petitioner of his right to file a supplemental brief, sent petitioner the trial transcripts and advised petitioner of his right to have counsel removed. *Id.* Counsel did not withdraw as counsel of record but remained available to brief any issues that the court might identify. *Id.*

Counsel was not required to state that he had examined the record, found no arguable issues, concluded that an appeal would be frivolous and wished to withdraw. *Wende*, 25 Cal. 3d at 442. Counsel's inability to find arguable issues could be inferred from his failure to raise any. *Id.* Nor was it incumbent on counsel to seek to withdraw, so long as he did not disable himself by describing the case as frivolous. *Id.*

In Robbins's case, appointed counsel independently examined the record and found no meritorious issues. Appendix H. The supervising California Appellate Project attorney concurred in his decision and gave him permission to file a no-merit brief. *Id.* In addition, petitioner filed a six-page brief on his own behalf. In his pro per brief, petitioner raised insufficiency

of the evidence and negligent or inadvertent failure of the prosecutor to disclose exculpatory evidence. *Id.* After independently examining the entire record, the state court of appeal found petitioner's counsel had complied with his responsibilities to his client and no arguable issues existed.

The Warden submits that the procedure employed in California provides even greater safeguards than those envisioned in *Anders*.

## II.

**Where, as in California, the *Anders* appellant is not denied counsel, attorney competence should be measured under *Strickland v. Washington***

As Chief Justice Rehnquist urged in his dissent in *Penson v. Ohio*, the effectiveness of counsel's assistance in an indigent defendant's no-merit appeal should be evaluated in accordance with the *Strickland* test. *Penson*, 488 U.S. 75, 91, citing *Strickland v. Washington*, 466 U.S. at 687-96. This is especially true in a case in which the appellant is actually represented by counsel throughout the pendency of his direct appeal, as is true in California and was untrue in *Penson*.

In *Penson*, counsel was relieved even before the state appellate court determined whether the appeal was meritless. *Id.* at 82. Even worse, the court refused to appoint counsel to represent the appellant after the court had found nonfrivolous issues. *Id.* at 83. The state court's refusal was thus a denial of counsel akin to that which was condemned in *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

In this case, there was no denial of counsel. Rather, appointed state appellate counsel, after investigating the law and the facts, simply found no arguable of-record issues and submitted a no-merit brief in which he set forth a statement of the case and of facts, declared under penalty of perjury that he had reviewed the entire record and informed Robbins of his rights, and asked the court to make an independent review, stating in his accompanying declaration that he had reviewed the entire record and advised Robbins of his rights. The court of appeal was legitimately reassured from the procedural history, summary of the evidence and counsel's declaration that counsel had reviewed the record and was not

submitting a no-merit brief simply out of inertia. On top of that, the California Appellate Project/Los Angeles supervising lawyer and the state appellate court reviewed the record and agreed with his assessment. And still there was more: after examining the record another three times to determine Robbins's petition for review and two petitions for writ of habeas corpus, the California Supreme Court denied him relief. Appendix D. Among the rejected issues was Robbins's claim that appellate counsel was ineffective.

Notwithstanding the state courts' unambiguous finding and without even considering the unfairness or unreliability of the state criminal proceedings, the Ninth Circuit initially invalidated the state appeal on grounds that there were two "arguably nonfrivolous" issues counsel could have raised. Appendix B. In its amended opinion, the panel changed the formulation to "arguable." Appendix A. Even though the panel discarded the "arguably nonfrivolous" formulation in the amended opinion, it persisted in its original conclusion that the claimed error was prejudicial per se. *Id.* The Ninth Circuit's action was akin to invalidating a trial for denial of counsel on grounds of trial counsel's failure to make objections which could have been made, even if making those objections would have made no difference. In effect, the Ninth Circuit substituted *Gideon* for *Strickland*.

If Robbins's counsel had raised a single issue on appeal -- even one so well settled or belied by the record that it was facially ludicrous -- his performance would have been judged in accordance with *Strickland*, which requires a defendant to show prejudice before he can obtain a reversal. There is no rational basis for requiring indigent

appellants whose lawyers raise a single meritless issue to make a greater showing than an indigent appellant whose lawyer has found no issues and is honest enough to say so. But precisely that disparity results from requiring single-issue indigent appellants to show prejudice stemming from appellate counsel's inadequacies and no-merit appellants to obtain per se reversal. Robbins should be required to show that he was prejudiced by counsel's alleged default.



## III.

**The Ninth Circuit misapplied *Teague v. Lane* when it invalidated California's no-merit brief procedure, because there were reasonable interpretations of *Anders* other than that which Robbins now seeks**

The analysis in *Robbins* threatens to demolish California's entire decades-old no-merit brief procedure. That decision is not only wrong on the merits but is also a flagrant violation of this Court's consistent prohibitions against applying a new rule on collateral review. *Teague v. Lane*, 489 U.S. at 299-300.

As this Court has repeatedly recognized in a line of cases beginning with *Teague*, a prisoner must demonstrate to the federal habeas court that he does not seek the retroactive benefit of a new rule of constitutional law, or even a settled rule applied in a novel setting. *O'Dell v. Netherland*, 117 S. Ct. at 1973. When raised by the state, "the court *must* apply *Teague* before considering the merits of the claim." *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) (emphasis in original). Because the *Teague* doctrine validates reasonable, good faith interpretations of precedent by state courts, a final state judgment may not be disturbed on federal habeas corpus "unless it can be said that a state court, at the time the conviction or sentence became final, would have acted objectively unreasonably by not extending the relief later sought in federal court." *O'Dell*, 117 S. Ct. at 1973.

Relief is barred by *Teague* unless, at the time Robbins's conviction became final, every state judge would have felt compelled by existing precedent to conclude that the relief Robbins now seeks was required by the Constitution. *O'Dell*, 117 S. Ct. at 1973. Regardless of contrary authority, the very existence of valid precedents that support the state court's good faith, reasonable

decisions works to preclude the retroactive application of new rules proscribed by *Teague*. *Id.*; see *Sawyer v. Smith*, 497 U.S. 227, 237-38 (1990); *Saffle v. Parks*, 494 U.S. 484, 490 (1990). Where relief on a claim was not "dictated by precedent," in the sense that "no other interpretation was reasonable," the retroactive application of the rule violates *Teague v. Lane*. *Lambrix v. Singletary*, 520 U.S. 518, 117 S. Ct. 1517, 1530 (1997).

There are three steps in the *Teague* analysis. First, the court must determine when the state conviction became final. Second, the court must survey the legal landscape as it then existed to determine whether a state court considering the claim would have felt compelled by existing precedent to conclude that the rule sought by the state prisoner was required by the Constitution. Third, if the court determines that a petitioner seeks the benefit of a new rule, it must consider whether the rule falls within one of two "narrow exceptions to nonretroactivity." *Lambrix v. Singletary*, 117 S. Ct. at 1525.

Petitioner's conviction was final for purposes of this analysis on January 19, 1993. Rule 13, Rules of the Supreme Court of the United States; *Caspari v. Bohlen*, 510 U.S. at 389. California's no-merit brief procedure had been in place since 1979. *People v. Wende*, 25 Cal. 3d at 441-42.

As discussed in argument I above, after this Court invalidated California's no-merit-letter procedure the California courts construed and applied the rule in *Anders*. *Anders v. California*, 386 U.S. at 741-42; *People v. Feggans*, 67 Cal. 2d at 447-48; see also *People v. Wende*, 25 Cal. 3d at 441-42. Over the years, there has been no direct constitutional challenge to the holdings of *Feggans* and *Wende*. Consequently, reasonable California jurists have relied on *Feggans* and *Wende* as valid declarations of the *Anders* requirements for no-merit briefs in indigent criminal appeals.

Before the Ninth Circuit overturned the state court's reasonable expectations, it was obliged under *Teague* to conduct a survey of the legal landscape at the time Robbins's conviction became final. *O'Dell v. Netherland*, 117 S. Ct. at 1973; *Lambrix v. Singletary*, 117 S. Ct. at 1525-27. Such a survey would have revealed that not all state judges felt constitutionally compelled by existing precedent to reach the result Robbins now seeks.

Although the Ninth Circuit suggests that the analysis in *Penson v. Ohio* is controlling, nothing in *Penson* mandates the result Robbins seeks. Indeed, it is notable that in the years between *Penson* and *Robbins* it does not appear to have occurred to anyone that *Penson* invalidated California's *Wende* procedure. That is not surprising, because *Penson* does not require such an outcome.

In *Penson*, appellate counsel declined to file a brief in a case he believed meritless and instead filed a document which "[bore] a marked resemblance" to the letter brief disapproved in *Anders*. *Penson*, 488 U.S. at 80-81 and 81 n.3. Counsel's no-merit certification erroneously failed to draw attention to anything in the record which might have supported the appeal, leaving the Ohio court with no basis for concluding counsel had performed his duty carefully. *Penson*, 488 U.S. at 81-82. In addition, the Ohio reviewing court erred in granting counsel's request to withdraw from the case before it independently reviewed the record. *Id.* at 82-83. "Most significantly, the Ohio court erred by failing to appoint new counsel to represent petitioner after it had determined that the record supported 'several arguable claims.'" *Id.* at 83. In *Penson*, this Court held that the identification of arguable issues by the Ohio reviewing court "created a constitutional imperative that counsel be appointed[.]" and the error in failing to do so was reversible per se. *Id.* at 84. In California, an indigent appellant is never without counsel.

Nor did the result in *McCoy v. Wisconsin*, 486 U.S. 429, compel state-court judges to jettison California's no-merit brief procedure. In violation of a Wisconsin rule of court which he believed was unethical and contrary to *Anders*, appellate counsel in *McCoy* refused to provide the reasons he believed the appeal baseless and sought to have the rule declared unconstitutional. *McCoy*, 486 U.S. at 432-33. The Wisconsin Supreme Court rejected McCoy's argument, as did this Court. *Id.* at 433-34, 442-43. This Court stated that it did not expect an *Anders* brief to serve as a substitute for an advocate's brief, but only to assist the state reviewing court in deciding whether the appeal is so frivolous that the defendant has no federal constitutional right to counsel. *McCoy*, 486 U.S. at 439 n.13.

Significantly, this Court also explained that whether the state's rule is consistent with *Anders* can only be determined in light of the state Supreme Court's explanation of the rule's requirements. *Id.* at 440. The Warden submits that *McCoy* merely approves Wisconsin's method of handling indigent appeals. It does not purport to discredit other interpretations of *Anders v. California*.

The Ninth Circuit's application of *Teague* has been grudging and superficial. By leaving the *Teague* issue for last, the panel disregarded this Court's admonition that the new-rule issue "must apply *Teague* before considering the merits of the claim." *Caspari v. Bohlen*, 510 U.S. at 389 (emphasis in original). Nor did the panel take the trouble to survey the legal landscape as it existed in 1993.

If it had done so, it would have found that the legal landscape validated the reasonableness of California's construction of *Anders*. For example, in Oregon, an appointed attorney who concludes that there are no non-frivolous issues to present "has no mandatory ethical obligation to withdraw from the representation[.]" so long as he himself does not knowingly advance an unwarranted claim. *State v. Balfour*, 311 Or. 434, 814 P.2d



1069, 1078 (Or. 1991). Construing *Anders* in light of *Penson* and *McCoy*, the *Balfour* court concluded it would not further counsel's ability to discharge his ethical obligations to his client and the court if counsel were compelled to file an *Anders* brief "spell[ing] out the potentially limitless variety of 'arguably supportive' issues that counsel can fabricate or discern." *Balfour*, 814 P.2d at 1079. Appellate counsel in Oregon has no obligation to include argument in the brief. *Balfour*, 814 P.2d at 1080.

Likewise, reasonable federal judges could -- and did -- differ on whether California's *Wende* procedure met the mandates of *Anders*. For example, in deciding *Marroquin v. Prunty*, in which another petitioner contemporaneously claimed ineffective assistance of appellate counsel because counsel had filed a *Wende* brief, Judge David Kenyon of the Central District of California did not feel compelled by *Anders* to overturn California's no-merit procedure and in an unpublished decision denied the writ. Appendix I.

The fact that Oregon's *Balfour* decision was part of the legal landscape in 1993 is palpable proof that reasonable jurists would not have felt compelled by existing precedent to rule in petitioner's favor on this claim at the time his conviction became final. *Caspari v. Bohlen*, 510 U.S. 383; *Graham v. Collins*, 506 U.S. 461, 467 (1993). Respondent vigorously asserted this point below, and the Ninth Circuit simply ignored it. The panel's contrary holding relies on a rigid adherence to its own invalid interpretation of *Teague*'s "new rule" language.

As this Court has recently made plain, a rule is new and therefore *Teague*-barred unless the *only* reasonable interpretation is that which the habeas petitioner seeks. *Lambrix v. Singletary*, 117 S. Ct. at 1530. Under this articulation of the *Teague* standard, there can be no doubt that the proposed modification of *Wende* and *Feggans* is a new rule.

The Warden urges this Court to grant certiorari in this case, not only to correct the particular errors made here, but also to signal its determination to vindicate the important comity and finality concerns which have been central to the reform of federal habeas corpus in recent years.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: December 17, 1998.

Respectfully submitted,

DANIEL E. LUNGREN

Attorney General

GEORGE WILLIAMSON

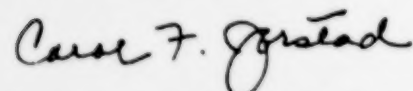
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APPENDIX A

**FOR PUBLICATION**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

LEE ROBBINS,  
*Petitioner-Appellee,*  
v.  
GEORGE SMITH, Warden, California  
Department of Corrections,  
*Respondent-Appellant.*

No. 95-56640  
D.C. No.  
CV-94-01157-GHK

LEE ROBBINS,  
*Petitioner-Appellant,*  
v.  
GEORGE SMITH,  
*Respondent-Appellee.*

No. 96-55063  
D.C. No.  
CV-94-01157-GHK  
**AMENDED  
OPINION**

Appeals from the United States District Court  
for the Central District of California  
George H. King, District Judge, Presiding

Argued and Submitted  
October 8, 1996—Pasadena, California

Filed September 23, 1997  
Amended August 13, 1998

Before: Procter Hug, Jr., Chief Judge, Harry Pregerson and  
Stephen Reinhardt, Circuit Judges.

Opinion by Chief Judge Hug

## SUMMARY

## Criminal Law and Procedure/Habeas

The court of appeals affirmed a judgment of the district court in part. The court held that a district court must rule on all exhausted claims of trial error raised in a habeas corpus petition even if the court grants the petition on a claim of ineffective assistance of appellate counsel.

Appellee Lee Robbins represented himself at trial and was convicted of second-degree murder and grand theft auto. Appointed counsel for his state appeal filed a no-merit brief which failed to present any possible grounds for appeal. The brief included a request that the court review the record for arguable issues. Robbins filed a brief on his own behalf.

The California Court of Appeal affirmed Robbins's conviction. The California Supreme Court denied his petition for review.

Robbins filed a federal habeas corpus petition, alleging that his appointed state appellate counsel failed to present his claims in accordance with *Anders v. California*, 386 U.S. 738 (1967). He also raised numerous trial errors.

The district court granted a conditional writ, concluding that at least two non-frivolous issues existed for appeal: (1) the trial court erred in failing to allow Robbins to withdraw the waiver of his right to counsel; and (2) the court failed to provide him with either the money or the means to prepare his own defense.

The State appealed, contending that appointed counsel's actions satisfied the requirements of *Anders*; the district court erred in basing its grant of Robbins's petition on the finding that at least two arguable issues existed for appeal; and the

application of *Anders* violated *Teague v. Lane*, 489 U.S. 288 (1989).

Robbins cross-appealed, asserting that the district court should have granted relief on his claims of constitutional error in the trial, entitling him to a new trial.

[1] The provisions of the Antiterrorism and Effective Death Penalty Act were not applicable because Robbins filed his petition prior to the Act's effective date.

[2] *Anders* set forth court-appointed appellate counsel's duty to further a client's case after determining the appeal to be without merit. [3] Appointed counsel must either provide active and vigorous appellate representation of indigent criminal defendants or, after conducting a conscientious examination of the record and concluding that any appeal would be wholly frivolous, request leave to withdraw and file a brief identifying anything in the record that might arguably support an appeal.

[4] The obligation of the court of appeals was to determine whether appellate counsel met his obligation under *Anders* and its progeny. Robbins's appointed counsel neither provided active and vigorous appellate representation, nor complied with *Anders*. The brief filed on Robbins's behalf completely failed to identify any grounds that arguably supported an appeal. Accordingly, the district court correctly found that Robbins's counsel did not comply with *Anders*.

[5] *Anders* creates a very low threshold for which arguments counsel must brief for the court. Counsel must bring to the court's attention anything in the record that might arguably support the appeal. [6] The two issues identified by the district court were arguable and should have caused the state appellate court to appoint new counsel for Robbins.

[7] *Teague* held that new constitutional rules cannot be applied retroactively to cases on collateral review unless they



fall into one of two narrow exceptions. The district court's holding did not involve a new rule. The facts of Robbins's case almost directly mirrored those of *Anders*. Accordingly, no "new" constitutional rule was invoked.

[8] Had Robbins not raised the *Anders* issue, the district court would have reached the merits of Robbins's claims of constitutional error at trial. Had the district court ruled in Robbins's favor on them, a grant of habeas relief would have required either release or a new trial.

[9] The district courts have been directed to rule on all claims raised in a petition for habeas corpus, even if the petition is granted on one. [10] Granting the writ only for the ineffective assistance of counsel on appeal leaves the challenges underlying the conviction unresolved. This can cause grave injustices to defendants who must await resolution of a renewed appeal while potentially deserving a retrial and possibly an acquittal. [11] Robbins was entitled to have trial issues considered just as any other habeas petitioner would. That Robbins also presented an allegation of ineffective assistance of appellate counsel was a secondary issue that would come into play only if the district court were to deny relief for trial errors. That appeal would be a renewal of the direct appeal, and could encompass any issues that could have been raised on direct appeal.

[12] Because the district court addressed the appellate claims and decided them correctly, it was in the interest of judicial economy and efficiency to affirm them. If trial error were found to have occurred and required vacation of the conviction, the appellate errors would become immaterial. If no such trial errors were found, the district court's original order would again become applicable.

#### COUNSEL

Carol Frederick Jorstad, Deputy Attorney General, Los Angeles, California, for the respondent-appellant-cross-appellee.

Elizabeth A. Newman and Ronald J. Nessim, Bird, Marella, Boxer, Wolpert & Matz, Los Angeles, California, for the petitioner-appellee-cross-appellant.

#### OPINION

HUG, Chief Judge:

Robbins was convicted in California state court of second-degree murder and grand theft auto. His petition for habeas corpus alleges that his rights under the United States Constitution were violated because of constitutional errors in his trial and also because of ineffective assistance of counsel in his direct appeal. The district court held that Robbins was denied effective assistance of counsel on appeal because of the failure of his appointed counsel to comply with the minimum requirements of *Anders v. California*, 386 U.S. 738 (1967). The district court did not reach the exhausted issues set forth in Robbins' petition concerning the alleged violation of his constitutional rights at the trial stage. The district court's order would only require that Robbins be afforded an opportunity to appeal his conviction with the aid of effective counsel.

We have jurisdiction pursuant to 28 U.S.C. § 2253 and we affirm the district court's granting of Robbins's habeas petition on the *Anders* issue. We remand, however, to the district court for consideration of the alleged constitutional violations at trial that have been properly exhausted in the state courts. We hold that Robbins is entitled to consideration of these issues at this time. If the petition is granted on any of those grounds, it would obviate the necessity for an appeal. If the petition is denied on those grounds, the new appeal in the state court as required by the district court order would, of course, not be confined to exhausted issues, but would be a renewed direct appeal.

### I. FACTS AND PRIOR PROCEEDINGS

Lee Robbins, an indigent defendant, represented himself at trial, where he was convicted of second-degree murder and grand theft auto. He was sentenced to seventeen years to life in the California state prison on September 5, 1990.

Robbins received appointed counsel for his state appeal. His attorney filed a no-merit brief before the court, which briefly outlined the facts surrounding Robbins's trial and failed to present any possible grounds for appeal. Included in the short document was a request that the court itself review the record for arguable issues. Counsel pledged to remain "available to brief any [issue(s)] upon invitation of the court."

Robbins subsequently filed a brief on his own behalf. After the California Court of Appeals found Robbins's claims to be unsupported by the record and that no other arguable issues existed, his appeal was denied on December 12, 1991. Robbins's petition for review by the California Supreme Court was denied on October 21 of the following year.

After exhausting his state remedies on January 26, 1994,<sup>1</sup> Robbins filed, pursuant to 28 U.S.C. § 2254, an amended first federal habeas petition on February 24, 1994. He argued that his appointed state appellate counsel failed to present his claims in accordance with *Anders v. California*, 386 U.S. 738 (1967). He also raised numerous trial errors, among them: (1) that the prosecutor had violated his duty to disclose exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963); (2) that the court had erred in failing to allow Robbins to withdraw the waiver of his right to counsel; (3) that the court had failed to provide him with either the money or the means to prepare a case in his own defense; and (4) that the court

<sup>1</sup>Robbins filed a habeas petition in state court, which the California Supreme Court ultimately denied on the merits. The petition raised the same issues that Robbins now raises in his federal habeas petition.

had deprived him of his right to a fair trial by failing to secure the presence of the witnesses he had subpoenaed.

After counsel was appointed to represent Robbins, and after several rounds of supplemental briefing, the district court granted his habeas petition on October 24, 1995, "to the extent that petitioner shall be discharged from custody unless the California Court of Appeal accepts jurisdiction over petitioner's direct appeal within 30 days." The State of California appealed. Robbins cross-appealed, arguing that the district court should have granted relief on his claims of constitutional error in the trial, thereby entitling him to a new trial.

### II. Applicability Of AEDPA

[1] As a threshold matter, we must decide whether the new substantive and procedural requirements of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), signed into law on April 24, 1996, are applicable to this case. Though the answer to the question was not clear at the time of oral argument, the Supreme Court has since held that the sections of AEDPA relevant to this case do not apply to cases filed in the federal courts prior to the Act's effective date of April 24, 1996. *See Lindh v. Murphy*, 117 S. Ct. 2059, 2068 (1997); *see also Jeffries v. Wood*, 103 F.3d 827, 827 (9th Cir. 1996). Robbins filed his § 2254 petition in the district court in February 1994. Thus, the provisions of AEDPA do not apply to this petition.

### III. The State's Appeal

The district court held that Robbins's representation during his direct appeal was ineffective under *Anders v. California*, 386 U.S. 738 (1967). It was on this basis that the district court granted a conditional writ of habeas corpus. The State appeals that order, arguing (1) that the brief filed by Robbins's appointed counsel complied with *Anders* as interpreted by the California Supreme Court, (2) that the district court erred in



finding that arguable issues existed, and (3) that the application of *Anders* violates *Teague v. Lane*, 489 U.S. 288 (1989). We address each of these arguments below.

[2] *Anders* is the Supreme Court's landmark pronouncement setting forth court-appointed appellate counsel's duty to further a client's case after determining the appeal to be without merit. *Anders* involved the situation where an indigent defendant's appointed counsel, after concluding an appeal was frivolous, filed a letter brief so informing the court. The letter noted that counsel remained at the court's disposal to brief any issues that the court were to see fit. The defendant's request for replacement counsel was denied, and the California Court of Appeals affirmed the conviction.

*Anders* subsequently filed a federal habeas petition, arguing that his right to effective counsel on appeal had been violated. The Supreme Court agreed. The Court was convinced that the appellate court reviewed *Anders*'s claim without the benefit of briefing or advocacy based on "counsel's bare conclusion that the appeal was frivolous." *Anders*, 386 U.S. at 742. The Court held that such a letter brief from defendant's counsel "cannot be an adequate substitute for the right to full appellate review." " *Id.* (quoting *Eskridge v. Washington State Bd.* 357 U.S. 214, 215 (1958)).

The Court in *Anders* outlined the appropriate procedure as follows:

The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae*. The no-merit letter and the procedure it triggers do not reach that dignity. Counsel should, and can with honor and without conflict, be of more assistance to his client and to the court. His role as advocate requires that he support his client's appeal to the best

of his ability. Of course, if counsel finds his case to be wholly frivolous after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court — not counsel — then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

*Anders*, 386 U.S. at 744.

[3] In *Penson v. Ohio*, the Supreme Court explained that "*Anders*, in essence, recognizes a limited exception to the requirement articulated in [*Douglas v. California*, 372 U.S. 353 (1963)] that indigent defendants receive representation on their first appeal as of right." *Penson v. Ohio*, 488 U.S. 75, 83 (1988). This limited exception recognizes that the Fourteenth Amendment does not demand that a State require that appointed counsel pursue wholly frivolous appeals. *Id.* at 83-84. *Anders* and *Douglas* thus set forth the exclusive procedure through which appointed counsel's performance can pass constitutional muster: Appointed counsel must either provide active and vigorous appellate representation of indigent criminal defendants or, after conducting a conscientious examination of the record and concluding that any appeal would be wholly frivolous, request leave to withdraw and file a brief identifying anything in the record that might arguably support

an appeal. See *Anders*, 386 U.S. at 744; see also *Penson*, 488 U.S. at 80, 83-84.

The California Supreme Court interpreted *Anders* in *People v. Feggans*, 67 Cal. 2d 444, 432 P.2d 21 (1967), and later in *People v. Wende*, 25 Cal. 3d 436, 600 P.2d 1071 (1979). *Wende* quoted *Feggans* as stating the appropriate rule establishing the duty of counsel:

In *People v. Feggans* (1967) 67 Cal.2d 444, 62 Cal. Rptr. 419, 432 P.2d 21, we responded to the Supreme Court's mandate as follows: "Under *Anders*, regardless of how frivolous an appeal may appear . . . , a no-merit letter will not suffice. Counsel must prepare a brief to assist the court in understanding the facts and the legal issues in the case. The brief must set forth a statement of the facts with citations to the transcript, discuss the legal issues with citations of appropriate authority, and argue all issues that are arguable. . . . If counsel concludes that there are no arguable issues and the appeal is frivolous, he may limit his brief to a statement of the facts and applicable law and may ask to withdraw from the case, but he must not argue the case against his client. Counsel is not allowed to withdraw from the case until the court is satisfied that he has discharged his duty to the court and his client to set forth adequately the facts and issues involved. If counsel is allowed to withdraw, defendant must be given an opportunity to present a brief, and thereafter the court must decide for itself whether the appeal is frivolous. [Citations.] If any contention raised is reasonably arguable, no matter how the court feels it will probably be resolved, the court must appoint another counsel to argue the appeal. (*People v. Feggans*, *supra*, 67 Cal.2d at 447-48, 62 Cal.Rptr. at 421, 432 P.2d at 23)."

*Wende*, 600 P.2d at 1073-74.

The State contends that, because Robbins's state appellate counsel's brief complies with the strictures of *Wende*, the district court erred in determining the brief to be insufficient under *Anders*. The State argues that appointed counsel's actions in this case satisfy the requirements of *Anders*, as construed by *Feggans* and *Wende*, because: (1) the nonexistence of arguable issues should have been inferred from counsel's failure to raise any; and (2) despite the fact that it should have been inferred that counsel concluded that there was a lack of arguable issues, it was not incumbent on him to withdraw because he had not "disabled himself from effectively representing" Robbins by describing his case as frivolous. See *Wende*, 600 P.2d at 1075.

[4] Our obligation in this habeas action is to determine whether appellate counsel met his obligations under the United States Supreme Court's requirements set forth in *Anders* and its progeny.<sup>2</sup> It is apparent that those requirements were not met. Robbins's appointed counsel neither provided active and vigorous appellate representation nor complied with *Anders* and *Feggans*. The brief filed on Robbins's behalf completely failed to identify any grounds that arguably supported an appeal. Rather, it briefly summarized the procedural and historical facts of the case and requested that the state appellate court "independently review the entire record for arguable issues." Accordingly, the district court correctly found that Robbins's counsel did not comply with *Anders*.

The State also argues that the district court erred in basing its grant of Robbins's habeas petition on the finding that at least two arguable issues existed for appeal. In making this

<sup>2</sup>We only address the obligations of appellate counsel in this decision. Our opinion in no way relieves the state court judges of their obligation under *Anders* and *Wende* to conduct their own independent review of the proceedings to decide whether the appeal is wholly frivolous.



argument, the State assumes that the nonexistence of arguable issues would render appointed counsel's failure to comply with *Anders* harmless. We need not decide whether this assumption is correct because we conclude that the district court correctly determined that arguable issues existed.

The district court found that at least two nonfrivolous appellate issues existed in Robbins's case: (1) that the denial of Robbins's attempt to withdraw the waiver of his right to counsel constituted error; and (2) that the inadequacy of the county jail's library deprived him of a meaningful opportunity to prepare his defense. It further noted that there may well be other arguable issues. Robbins also points to several other exhausted, arguable appellate issues, including prosecutorial misconduct in violation of *Brady v. Maryland*, wrongful denial of Robbins's *Marsden* motions (motions under California law relating to the substitution of counsel), and interference with Robbins's constitutional right to prepare an adequate defense on his own behalf.

[5] *Anders* creates a very low threshold for which arguments counsel must brief for the court. See *United States v. Griffy*, 895 F.2d 561, 563 (9th Cir. 1990); *Lombard v. Lynaugh*, 868 F.2d 1475, 1487 (5th Cir. 1989) (Goldberg, J. concurring). Certainly, counsel need not argue only "winning" arguments. Instead, counsel must bring to the court's attention "anything in the record that might arguably support the appeal." *Anders*, 386 U.S. at 744. For purposes of California law, an issue is "arguable" when it has some potential for success, meaning some possibility of a result requiring reversal or modification of the judgment. *People v. Johnson*, 123 Cal. App. 3d 106, 109 (1981).

[6] The two issues identified by the district court — (1) whether the denial of Robbins's attempt to withdraw the waiver of his right to counsel constituted error; and (2) whether the inadequacy of the county jail's library deprived him of a meaningful opportunity to prepare his defense — are

arguable and should have caused the state appellate court to appoint new counsel for Robbins.<sup>3</sup> As noted by the district court:

The right guaranteed by the Fourteenth and Sixth Amendments to waive one's right to counsel and proceed in pro per "is premised upon the right of the defendant to make a defense." *Milton v. Morris*, 767 F.2d 1443, 1445-46 (9th Cir. 1985) (citing *Faretta v. California*, 422 U.S. 806, 819-20 (1975)). An incarcerated defendant cannot meaningfully exercise this right without access to tools such as law books. *Id.* at 1446; *Taylor v. List*, 880 F.2d 1040, 1047 (9th Cir. 1989).

The California trial judge's own words — "it's almost impossible as a pro per to prepare yourself a decent defense, especially given the law library" — justify the district court's conclusion that Robbins's inability to prepare an adequate defense was, in the very least, an arguable issue. The California trial judge even told Robbins that "if you are looking up law, you are not going to be able to find it because somebody has torn it out before you got there." There is some potential, had Robbins's appointed counsel raised and vigorously advanced this issue on appeal, that Robbins's conviction would have been reversed.

As the district court noted, the California trial court's treatment of Robbins's request to withdraw his waiver of his right to counsel also raises a serious constitutional question. The district court stated, "[f]airly read, petitioner asked for the appointment of counsel as an alternative to advisory counsel. Because the judge failed to even consider whether petitioner was reasserting his right to counsel, it too is a nonfrivolous

<sup>3</sup>Because we conclude that the district court correctly identified at least two arguable issues, we need not determine whether other arguable issues exist.

issue which should have been raised by petitioner's appellate counsel." We agree.

[7] Finally, the State argues that granting relief on Robbins's *Anders* claim violates *Teague v. Lane*. *Teague* held that new constitutional rules cannot be applied retroactively to cases on collateral review unless they fall into one of two narrow exceptions. It is clear, however, that the district court's holding in this case did not involve a new rule. Our discussion above indicates that the outcome of Robbins's case was predetermined by the controlling analysis provided by the Supreme Court in *Anders* and *Penson*, both of which were handed down before Robbins's conviction. Likewise, the California Supreme Court's decision in *Feggans*, which is cited approvingly in *Wende*, compels the result in this case and was decided before Robbins's conviction. The consequences of counsel's failure to raise arguable issues were unambiguously detailed in *Anders* and *Feggans*. Application of *Anders* and *Feggans* to this case required no extension of precedent or logical interpolation. The facts of Robbins's case almost directly mirror those of *Anders*. Accordingly, no "new" constitutional rule was invoked in this case.

#### IV. Robbins's Cross-Appeal

Robbins argues in his cross-appeal that the district court erred when it failed to consider and to rule upon his allegations of constitutional error in the state court trial.

[8] Robbins brought eleven exhausted claims in the district court relating to his trial. Had Robbins not raised the *Anders* issue, the district court would have reached the merits of those claims. Had the district court ruled in Robbins's favor on them, a grant of habeas relief would have required either release or a new trial. The need for a new direct appeal — the remedy granted by the district court — would be obviated by this outcome. Robbins is entitled to have these foundational claims in his habeas petition considered first.

[9] The Eleventh Circuit has, in the exercise of its supervisory authority, directed district courts to rule on all claims raised in a petition for habeas corpus, even if the petition is granted on one claim. *Clisby v. Jones*, 960 F.2d 925, 936 (11th Cir. 1992) (en banc). This has the advantage of avoiding possible remands for consideration of remaining claims if the district court's decision on one claim is reversed. It has the disadvantage of requiring considerable extra work by the district court to decide many claims that may be completely unnecessary, because they will be mooted on appeal.

[10] We have taken a different approach in our circuit. In *Blazak v. Ricketts*, 971 F.2d 1408, 1413 (9th Cir. 1992) (per curiam), we declined to apply the *Clisby* approach to a capital case in which the district court granted the writ on one guilt phase issue without deciding all the remaining guilt phase issues or any of the penalty phase issues. We drew a distinction, however, between a case which granted a petition on a sentencing issue but left unresolved an issue affecting the validity of the conviction. *Id.* at 1413-14. We stated:

Moreover, unlike habeas grants exclusively on sentencing issues, the grant of a habeas petition because of the constitutional invalidity of a conviction raises concerns that a possibly innocent person has been unjustifiably incarcerated on death row for a number of years. Delaying retrial in such cases, while attorneys fight over a sentence that may no longer exist, risks the perpetuation of a monumental injustice, should retrial ultimately result in an acquittal.

*Id.* at 1414 n.7. The same policy considerations are involved in this case. Granting the writ only for the ineffective assistance of counsel on appeal leaves the challenges underlying the conviction unresolved. Resolving other issues while leaving challenges to the underlying conviction unresolved potentially can cause grave injustice to defendants like Robbins who, despite alleging constitutional shortcomings in the trial



process, must await resolution of a renewed appeal while potentially deserving a retrial and possibly an acquittal.

*Penson v. Ohio*, cited by California in opposition to Robbins's claim, is inapposite. Penson was an indigent defendant who was convicted of several serious felonies. His appointed appellate counsel filed a letter brief certifying his appeal to be meritless and asking to withdraw. In violation of *Anders*, the Ohio Court of Appeals allowed counsel to withdraw and conducted its own review of the record without the benefit of advocacy or briefing. *Penson*, 488 U.S. at 78. The Ohio court found "several arguable claims," reversed one of his convictions, and then dismissed his appeal. *Id.* at 79. Penson petitioned for a writ of certiorari. The Supreme Court granted the petition and reversed.

[11] *Penson* is unlike the case at bar because it involved the Supreme Court's review of the Ohio appellate court's dismissal of Penson's direct appeal. When the Court recognized that "several arguably meritorious grounds for reversal" existed, it remanded the matter to the Ohio appellate court for further proceedings. *Id.* It was, however, reviewing the direct appeal of a state court action, and not a habeas petition. In this circumstance, the Court explained that it would not "sit in place of the Ohio Court of Appeals in the first instance to determine whether petitioner was prejudiced as to any appellate issue." *Id.* at 87 n.9 (emphasis added). In this habeas proceeding the district court will be considering alleged constitutional errors in the defendant's trial that have been exhausted in the state court. Robbins is entitled to have those trial issues considered at this time just as any other habeas petitioner would. The fact that Robbins also presents an allegation of ineffective assistance of appellate counsel is a secondary issue that comes into play only if the district court denies relief for trial errors. That appeal would then be a renewal of the direct appeal as in *Penson* and could encompass any issues that could have been raised on direct appeal.

[12] Because the district court should have addressed the claims of trial error first, it might not have needed to address Robbins's claims of appellate error as well. Because it did address the appellate claims, however, and because it decided those questions correctly, it is in the interest of judicial economy and efficiency to affirm them now. If trial error is found to have occurred and to require vacation of the conviction, the appellate errors will become immaterial. If no such trial errors are found, however, the district court's original order will again become applicable. *Cf. Penson*, 488 U.S. at 88-89 (the actual or constructive denial of assistance of counsel is presumed to result in prejudice); *Lombard*, 868 F.2d at 1487 (formal physical presence of appellate attorney is not appellate counsel; defendant constructively denied assistance of counsel where attorney filed document containing no arguments going to merits of appeal).

## V. CONCLUSION

The judgment of the district court is **AFFIRMED IN PART** but the case is **REMANDED** to the district court for consideration of whether the alleged constitutional trial errors that defendant raises merit reversal of Robbins's underlying convictions and the granting of a new trial.

APPENDIX B



**FOR PUBLICATION**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

LEE ROBBINS,

*Petitioner-Appellee,*

v.

GEORGE SMITH, Warden, California  
Department of Corrections.

*Respondent-Appellant.*

No. 95-56640

D.C. No.  
CV-94-01157-GHK

LEE ROBBINS,

*Petitioner-Appellant,*

v.

GEORGE SMITH,

*Respondent-Appellee.*

No. 96-55063

D.C. No.  
CV-94-01157-GHK  
OPINION

Appeals from the United States District Court  
for the Central District of California  
George H. King, District Judge, Presiding

Argued and Submitted  
October 8, 1996—Pasadena, California

Filed September 23, 1997

Before: Procter Hug, Jr., Chief Judge, Harry Pregerson and  
Stephen Reinhardt, Circuit Judges.

Opinion by Chief Judge Hug

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**SUMMARY**

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**Criminal Law and Procedure/Habeas**

The court of appeals affirmed in part a judgment of the district court and remanded. The court held that district courts must rule on all claims raised in a petition for habeas corpus, even if the petition is granted on one claim to avoid injustice to a petitioner potentially deserving a retrial and possibly an acquittal.

Appellee Lee Robbins represented himself at trial and was convicted of second-degree murder and grand theft auto. Appointed counsel for his state appeal filed a no-merit brief which failed to present any possible grounds for appeal. The brief included a request that the court review the record for arguable issues. Robbins filed a brief on his own behalf.

The state court of appeals denied Robbins's appeal. His petition for review by the state supreme court was also denied.

Robbins filed a federal habeas corpus petition, alleging that his appointed state appellate counsel failed to present his claims in accordance with *Anders v. California*, 386 U.S. 738 (1967). He also raised numerous trial errors.

The district court granted a conditional writ of habeas corpus, finding that at least two non-frivolous issues existed for appeal: (1) the trial court erred in failing to allow Robbins to withdraw the waiver of his right to counsel; and (2) the court failed to provide him with either the money or the means to prepare his own defense.

The government appealed, arguing that appointed counsel's actions satisfied the requirements of *Anders*; the district court erred in basing its grant of Robbins's petition on the finding that at least two arguable issues existed for appeal; and the

application of *Anders* violated *Teague v. Lane*, 489 U.S. 288 (1989).

Robbins cross-appealed, arguing that the district court should have granted relief on his claims of constitutional error in the trial, entitling him to a new trial.

[1] The provisions of the Antiterrorism and Effective Death Penalty Act were not applicable because Robbins filed his petition prior to the Act's effective date.

[2] *Anders* is the Supreme Court's landmark pronouncement setting forth court-appointed appellate counsel's duty to further a client's case after determining the appeal to be without merit. [3] The Fourteenth Amendment does not demand that appointed counsel pursue wholly frivolous appeals; however, under *Anders*, appointed counsel must either provide active and vigorous appellate representation of indigent criminal defendants or, after conducting a conscientious examination of the record and concluding that any appeal would be wholly frivolous, request leave to withdraw and file a brief identifying anything in the record that might arguably support an appeal.

[4] Robbins's appointed counsel neither provided active and vigorous appellate representation, nor complied with *Anders*.

[5] *Anders* creates a very low threshold for which arguments counsel must brief for the court. Counsel must bring to the court's attention anything in the record that might arguably support the appeal. [6] The two issues identified by the district court were arguably non-frivolous and should have caused the state to appoint new counsel for Robbins.

[7] In *Teague*, the Supreme Court held that new constitutional rules cannot be applied retroactively to cases on collateral review unless they fall into one of two narrow exceptions.

A case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final.

[8] The district court's holding did not involve a new rule. The outcome of Robbins's case was predetermined by the Supreme Court's analysis in *Anders*, which was handed down before Robbins's conviction.

[9] Had Robbins not raised the *Anders* issue, the district court would have reached the merits of Robbins's claims of constitutional error at trial. Had the district court ruled in Robbins's favor on them, a grant of habeas relief would have required either release or a new trial.

[10] The district courts have been directed to rule on all claims raised in a petition for habeas corpus, even if the petition is granted on one. [11] Granting the writ only for the ineffective assistance of counsel on appeal leaves the challenges underlying the conviction unresolved. This can cause grave injustices to defendants who must await resolution of a renewed appeal while potentially deserving a retrial and possibly an acquittal. [12] Remand was required for the district court to consider Robbins's claims of constitutional error at trial.

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### COUNSEL

Carol Frederick Jorstad, Deputy Attorney General, Los Angeles, California, for the respondent-appellant-appellee.

Elizabeth A. Newman and Ronald J. Nessim, Bird, Marella, Boxer, Wolpert & Matz, Los Angeles, California, for the petitioner-appellee-appellant.

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### OPINION

HUG, Chief Judge:

Robbins was convicted in California state court of second-degree murder and grand theft auto. His petition for habeas corpus alleges that his rights under the United States Constitution were violated because of constitutional errors in his trial and also because of ineffective assistance of counsel in his direct appeal. The district court held that Robbins was denied effective assistance of counsel on appeal because of the failure of his appointed counsel to comply with the minimum requirements of *Anders v. California*, 386 U.S. 738 (1967). The district court did not reach the exhausted issues set forth in Robbins' petition concerning the alleged violation of his constitutional rights at the trial stage. The district court's order would only require that Robbins be afforded an opportunity to appeal his conviction with the aid of effective counsel.

We have jurisdiction pursuant to 28 U.S.C. § 2253 and we affirm the district court's granting of Robbins's habeas petition on the *Anders* issue. We remand, however, to the district court for consideration of the alleged constitutional violations at trial that have been properly exhausted in the state courts. We hold that Robbins is entitled to consideration of these issues at this time. If the petition is granted on any of those grounds, it would obviate the necessity for an appeal. If the petition is denied on those grounds, the new appeal in the state court as required by the district court order would, of course, not be confined to exhausted issues, but would be a renewed direct appeal.

### 1. FACTS AND PRIOR PROCEEDINGS

Lee Robbins, an indigent defendant, represented himself at trial, where he was convicted of second-degree murder and



grand theft auto. He was sentenced to seventeen years to life in the California state prison on September 5, 1990.

Robbins received appointed counsel for his state appeal. His attorney filed a no-merit brief before the court, which briefly outlined the facts surrounding Robbins's trial and failed to present any possible grounds for appeal. Included in the short document was a request that the court itself review the record for arguable issues. Counsel pledged to remain "available to brief any [issue(s)] upon invitation of the court."

Robbins subsequently filed a brief on his own behalf. After the California Court of Appeals found Robbins's claims to be unsupported by the record and that no other arguable issues existed, his appeal was denied on December 12, 1991. Robbins's petition for review by the California Supreme Court was denied on October 21 of the following year.

After exhausting his state remedies on January 26, 1994, Robbins filed, pursuant to 28 U.S.C. § 2254, an amended first federal habeas petition on February 24, 1994. He argued that his appointed state appellate counsel failed to present his claims in accordance with *Anders v. California*, 386 U.S. 738 (1967). He also raised numerous trial errors, among them: (1) that the prosecutor had violated his duty to disclose exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963); (2) that the court had erred in failing to allow Robbins to withdraw the waiver of his right to counsel; (3) that the court had failed to provide him with either the money or the means to prepare a case in his own defense; and (4) that the court had deprived him of his right to a fair trial by failing to secure the presence of the witnesses he had subpoenaed.

After counsel was appointed to represent Robbins, and after

<sup>1</sup>Robbins filed a habeas petition in state court, which the California Supreme Court ultimately denied on the merits. The petition raised the same issues that Robbins now raises in his federal habeas petition.

several rounds of supplemental briefing, the district court granted his habeas petition on October 24, 1995, "to the extent that petitioner shall be discharged from custody unless the California Court of Appeal accepts jurisdiction over petitioner's direct appeal within 30 days." The State of California appealed. Robbins cross-appealed, arguing that the district court should have granted relief on his claims of constitutional error in the trial, thereby entitling him to a new trial.

## II. Applicability Of AEDPA

[1] As a threshold matter, we must decide whether the new substantive and procedural requirements of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), signed into law on April 24, 1996, are applicable to this case. Though the answer to the question was not clear at the time of oral argument, the Supreme Court has since held that the sections of AEDPA relevant to this case do not apply to cases filed in the federal courts prior to the Act's effective date of April 24, 1996. *See Lindh v. Murphy*, 117 S. Ct. 2059, 2068 (1997); *see also Jeffries v. Wood*, 103 F.3d 827, 827 (9th Cir. 1996). Robbins filed his § 2254 petition in the district court in February 1994. Thus, the provisions of AEDPA do not apply to this petition.

## III. The State's Appeal

The district court held that Robbins's representation during his direct appeal was ineffective under *Anders v. California*, 386 U.S. 738 (1967). It was on this basis that the district court granted a conditional writ of habeas corpus. The State appeals that order, arguing (1) that the brief filed by Robbins's appointed counsel complied with *Anders* as interpreted by the California Supreme Court, (2) that the district court erred in finding that arguably nonfrivolous issues existed, and (3) that the application of *Anders* violates *Teague v. Lane*, 489 U.S. 288 (1989). We address each of these arguments below.



[2] *Anders* is the Supreme Court's landmark pronouncement setting forth court-appointed appellate counsel's duty to further a client's case after determining the appeal to be without merit. *Anders* involved the situation where an indigent defendant's appointed counsel, after concluding an appeal was frivolous, filed a letter brief so informing the court. The letter noted that counsel remained at the court's disposal to brief any issues that the court were to see fit. The defendant's request for replacement counsel was denied, and the California Court of Appeals affirmed the conviction.

*Anders* subsequently filed a federal habeas petition, arguing that his right to effective counsel on appeal had been violated. The Supreme Court agreed. The Court was convinced that the appellate court reviewed *Anders*'s claim without the benefit of briefing or advocacy based on "counsel's bare conclusion" that the appeal was frivolous. *Anders*, 386 U.S. at 742. The Court held that such a letter brief from defendant's counsel "cannot be an adequate substitute for the right to full appellate review." *Id.* (quoting *Eskridge v. Washington State Bd.*, 357 U.S. 214, 215 (1958)).

[3] In *Penson v. Ohio*, the Supreme Court explained that "*Anders*, in essence, recognizes a limited exception to the requirement articulated in [*Douglas v. California*, 372 U.S. 353 (1963)] that indigent defendants receive representation on their first appeal as of right." *Penson v. Ohio*, 488 U.S. 75, 83 (1988). This limited exception recognizes that the Fourteenth Amendment does not demand that a State require that appointed counsel pursue wholly frivolous appeals. *Id.* at 83-84. *Anders* and *Douglas* thus set forth the exclusive procedure through which appointed counsel's performance can pass constitutional muster. Appointed counsel must either provide active and vigorous appellate representation of indigent criminal defendants or, after conducting a conscientious examination of the record and concluding that any appeal would be wholly frivolous, request leave to withdraw and file a brief identifying anything in the record that might arguably support

an appeal. *See Anders*, 386 U.S. at 744; *see also Penson*, 488 U.S. at 80, 83-84.

The California Supreme Court interpreted *Anders* in *People v. Feggans*, 67 Cal. 2d 444, 432 P.2d 21 (1967), and later in *People v. Wende*, 25 Cal. 3d 436, 600 P.2d 1071 (1979). The State contends that, because Robbins's state appellate counsel's brief complies with the strictures of *Wende*, the district court erred in determining the brief to be insufficient under *Anders*. The State argues that appointed counsel's actions in this case satisfy the requirements of *Anders*, as construed by *Feggans* and *Wende*, because: (1) the nonexistence of arguable issues should have been inferred from counsel's failure to raise any; and (2) despite the fact that it should have been inferred that counsel concluded that there was a lack of arguable issues, it was not incumbent on him to withdraw because he had not "disabled himself from effectively representing" Robbins by describing his case as frivolous. *See Wende*, 600 P.2d at 1075.

[4] Accepting the State's contention, that the state court decision in *Wende* allows a departure from the strict requirements of *Anders*, would override Supreme Court precedent. Our obligation in this habeas action is to determine whether appellate counsel met his obligations under the United States Supreme Court's requirements set forth in *Anders* and its progeny. It is apparent that those requirements were not met. Robbins's appointed counsel neither provided active and vigorous appellate representation nor complied with *Anders*. The brief filed on Robbins's behalf completely failed to identify any grounds that arguably supported an appeal. Rather, it briefly summarized the procedural and historical facts of the case and requested that the state appellate court "independently review the entire record for arguable issues." Accordingly, the district court correctly found that Robbins's counsel did not comply with *Anders*.

The State also argues that the district court erred in basing its grant of Robbins's habeas petition on the finding that at

least two arguable issues existed for appeal. In making this argument, the State assumes that the nonexistence of arguable issues would render appointed counsel's failure to comply with *Anders* harmless. We need not decide whether this assumption is correct because we conclude that the district court correctly determined that arguably nonfrivolous issues existed.

The district court found that at least two nonfrivolous appellate issues existed in Robbins's case: (1) that the denial of Robbins's attempt to withdraw the waiver of his right to counsel constituted error; and (2) that the inadequacy of the county jail's library deprived him of a meaningful opportunity to prepare his defense. It further noted that there may well be other arguable issues. Robbins also points to several other exhausted, arguably nonfrivolous appellate issues, including prosecutorial misconduct in violation of *Brady v. Maryland*, wrongful denial of Robbins's *Marsden* motions (motions under California law relating to the substitution of counsel), and interference with Robbins's constitutional right to prepare an adequate defense on his own behalf.

[5] *Anders* creates a very low threshold for which arguments counsel must brief for the court. See *United States v. Griffy*, 895 F.2d 561, 563 (9th Cir. 1990); *Lombard v. Lynaugh*, 868 F.2d 1475, 1487 (5th Cir. 1989) (Goldberg, J., concurring). Certainly, counsel need not argue only "winning" arguments. Instead, counsel must bring to the court's attention "anything in the record that might arguably support the appeal." *Anders*, 386 U.S. at 744. For purposes of California law, an issue is "arguable" when it has some potential for success, meaning some possibility of a result requiring reversal or modification of the judgment. *People v. Johnson*, 123 Cal. App. 3d 106, 109 (1981).

[6] The two issues identified by the district court — (1) whether the denial of Robbins's attempt to withdraw the waiver of his right to counsel constituted error; and (2)

whether the inadequacy of the county jail's library deprived him of a meaningful opportunity to prepare his defense — are arguably nonfrivolous and should have caused the state appellate court to appoint new counsel for Robbins.<sup>2</sup> As noted by the district court:

The right guaranteed by the Fourteenth and Sixth Amendments to waive one's right to counsel and proceed in pro per "is premised upon the right of the defendant to make a defense." *Milton v. Morris*, 767 F.2d 1443, 1445-46 (9th Cir. 1985) (citing *Faretta v. California*, 422 U.S. 806, 819-20 (1975)). An incarcerated defendant cannot meaningfully exercise this right without access to tools such as law books. *Id.* at 1446; *Taylor v. List*, 880 F.2d 1040, 1047 (9th Cir. 1989).

The California trial judge's own words — "it's almost impossible as a pro per to prepare yourself a decent defense, especially given the law library" — justify the district court's conclusion that Robbins's inability to prepare an adequate defense was, in the very least, an arguable issue. The California trial judge even told Robbins that "if you are looking up law, you are not going to be able to find it because somebody has torn it out before you got there." There is some potential, had Robbins's appointed counsel raised and vigorously advanced this issue on appeal, that Robbins's conviction would have been reversed.

As the district court noted, the California trial court's treatment of Robbins's request to withdraw his waiver of his right to counsel also raises a serious constitutional question. The district court stated, "[f]airly read, petitioner asked for the appointment of counsel as an alternative to advisory counsel.

<sup>2</sup>Because we conclude that the district court correctly identified at least two arguably nonfrivolous issues, we need not determine whether other arguably nonfrivolous issues exist.



Because the judge failed to even consider whether petitioner was reasserting his right to counsel, it too is a nonfrivolous issue which should have been raised by petitioner's appellate counsel." We agree.

[7] Finally, the State argues that granting relief on Robbins's *Anders* claim violates *Teague v. Lane*. *Teague* held that new constitutional rules cannot be applied retroactively to cases on collateral review unless they fall into one of two narrow exceptions. "[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301. Therefore, we must determine, "whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution." *Goeke v. Branch*, 514 U.S. 115, 118 (1995) (quoting *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994)).

[8] It is clear that the district court's holding in this case did not involve a new rule. Our discussion above indicates that the outcome of Robbins's case was predetermined by the controlling analysis provided by the Supreme Court in *Anders* and *Penson*, both of which were handed down before Robbins's conviction. The consequences of counsel's failure to raise arguable issues were unambiguously detailed in *Anders*. Application of *Anders* to this case required no extension of precedent or logical interpolation. The facts of Robbins's case almost directly mirror those of *Anders*. In light of these considerations, the *Goeke* test confirms that no "new" constitutional rule was invoked in this case.

#### IV. Robbins's Cross-Appeal

Robbins argues in his cross-appeal that the district court erred when it failed to consider and to rule upon his allegations of constitutional error in the state court trial.

[9] Robbins brought eleven exhausted claims in the district court relating to his trial. Had Robbins not raised the *Anders* issue, the district court would have reached the merits of those claims. Had the district court ruled in Robbins's favor on them, a grant of habeas relief would have required either release or a new trial. The need for a new direct appeal — the remedy granted by the district court — would be obviated by this outcome. Robbins is entitled to have these foundational claims in his habeas petition considered first.

[10] The Eleventh Circuit has, in the exercise of its supervisory authority, directed district courts to rule on all claims raised in a petition for habeas corpus, even if the petition is granted on one claim. *Clisby v. Jones*, 960 F.2d 925, 936 (11th Cir. 1992) (en banc). This has the advantage of avoiding possible remands for consideration of remaining claims if the district court's decision on one claim is reversed. It has the disadvantage of requiring considerable extra work by the district court to decide many claims that may be completely unnecessary, because they will be mooted on appeal.

[11] We have taken a different approach in our circuit. In *Blazak v. Ricketts*, 971 F.2d 1408, 1413 (9th Cir. 1992) (per curiam), we declined to apply the *Clisby* approach to a capital case in which the district court granted the writ on one guilt phase issue without deciding all the remaining guilt phase issues or any of the penalty phase issues. We drew a distinction, however, between a case which granted a petition on a sentencing issue but left unresolved an issue affecting the validity of the conviction. *Id.* at 1413-14. We stated:

Moreover, unlike habeas grants exclusively on sentencing issues, the grant of a habeas petition because of the constitutional invalidity of a conviction raises concerns that a possibly innocent person has been unjustifiably incarcerated on death row for a number of years. Delaying retrial in such cases, while attorneys fight over a sentence that may no longer exist,

risks the perpetuation of a monumental injustice, should retrial ultimately result in an acquittal.

*Id.* at 1414 n.7; see also *Rice v. Wood*, 44 F.3d 1396, 1402 n.10 (9th Cir. 1995). The same policy considerations are involved in this case. Granting the writ only for the ineffective assistance of counsel on appeal leaves the challenges underlying the conviction unresolved. Resolving other issues while leaving challenges to the underlying conviction unresolved potentially can cause grave injustice to defendants like Robbins who, despite alleging constitutional shortcomings in the trial process, must await resolution of a renewed appeal while potentially deserving a retrial and possibly an acquittal.

*Penson v. Ohio*, cited by California in opposition to Robbins's claim, is inapposite. Penson was an indigent defendant who was convicted of several serious felonies. His appointed appellate counsel filed a letter brief certifying his appeal to be meritless and asking to withdraw. In violation of *Anders*, the Ohio Court of Appeals allowed counsel to withdraw and conducted its own review of the record without the benefit of advocacy or briefing. *Penson*, 488 U.S. at 78. The Ohio court found "several arguable claims," reversed one of his convictions, and then dismissed his appeal. *Id.* at 79. Penson petitioned for a writ of certiorari. The Supreme Court granted the petition and reversed.

[12] *Penson* is unlike the case at bar because it involved the Supreme Court's review of the Ohio appellate court's dismissal of Penson's direct appeal. When the Court recognized that "several arguably meritorious grounds for reversal" existed, it remanded the matter to the Ohio appellate court for further proceedings. *Id.* It was, however, reviewing the direct appeal of a state court action, and not a habeas petition. In this circumstance, the Court explained that it would not "sit in place of the Ohio Court of Appeals in the first instance to determine whether petitioner was prejudiced as to any appellate issue." *Id.* at 87 n.9 (emphasis added). In this habeas pro-

ceeding the district court will be considering alleged constitutional errors in the defendant's trial that have been exhausted in the state court. Robbins is entitled to have those trial issues considered at this time just as any other habeas petitioner would. The fact that Robbins also presents an allegation of ineffective assistance of appellate counsel is a secondary issue that comes into play only if the district court denies relief for trial errors. That appeal would then be a renewal of the direct appeal as in *Penson* and could encompass any issues that could have been raised on direct appeal.

Because the district court should have addressed the claims of trial error first, it might not have needed to address Robbins's claims of appellate error as well. Because it did address the appellate claims, however, and because it decided those questions correctly, it is in the interest of judicial economy and efficiency to affirm them now. If trial error is found to have occurred and to require vacation of the conviction, the appellate errors will become immaterial. If no such trial errors are found, however, the district court's original order will again become applicable. *Cf. Penson*, 488 U.S. at 88-89 (the actual or constructive denial of assistance of counsel is presumed to result in prejudice); *Lombard*, 868 F.2d at 1487 (formal physical presence of appellate attorney is not appellate counsel; defendant constructively denied assistance of counsel where attorney filed document containing no arguments going to merits of appeal).

## V. CONCLUSION

The judgment of the district court is **AFFIRMED IN PART** but the case is **REMANDED** to the district court for consideration of whether the alleged constitutional trial errors that defendant raises merit reversal of Robbins's underlying convictions and the granting of a new trial.



## APPENDIX C

FILED  
CLERK, U.S. DISTRICT COURT  
OCTOBER 24, 1995  
CENTRAL DISTRICT OF CALIFORNIA  
BY DEPUTY

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

LEE ROBBINS,	)	No. CV 94-1157-GHK
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
GEORGE SMITH, WARDEN, et al.	)	
	)	
Respondents.	)	

Pursuant to the Memorandum and Order of the court, IT IS HEREBY ADJUDGED as follows:

(1) the petition for writ of habeas corpus is GRANTED, to the extent that petitioner shall be discharged from custody on the subject conviction unless the California Court of Appeal accepts jurisdiction over petitioner's direct appeal within thirty (30) days; and

(2) respondents shall notify the California Court of Appeal of this court's order.

DATED: This 24th day of October, 1995.

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GEORGE H. KING  
United States District Judge

FILED  
CLERK, U.S. DISTRICT COURT  
OCTOBER 24, 1995  
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

LEE ROBBINS,	)	NO. CV 94-1157-GHK
	)	
Petitioner,	)	
	)	MEMORANDUM AND
	)	ORDER
vs.	)	
	)	
GEORGE SMITH, WARDEN,	)	
et al.	)	
	)	
Respondents.	)	
	)	

Petitioner, a state prisoner, was convicted of second degree murder and grand theft auto. On February 24, 1994, he filed a petition for writ of habeas corpus with this court. We appointed counsel to represent petitioner, ordered supplemental briefing, and held oral argument on May 9, 1995.

Although petitioner asserts several claims, we reach only the claim of ineffective assistance of appellate counsel. Because we grant this petition on that ground, and this matter is returned to the state courts with instructions that petitioner be granted a direct appeal with new appellate counsel, we do not reach the merits of any of the other alleged errors, even though petitioner has exhausted his state remedies as to those other contentions. See Sherwood v. Tomkins, 716 F.2d 632, 634 (9th Cir.



1983) (potential reversal of petitioner's conviction on state appeal mooted federal claim renders petition premature and subject to dismissal for failure to exhaust state remedies).

### DISCUSSION

Petitioner claims he was denied effective assistance of counsel because his appellate attorney did not prepare a proper appellate brief. (Pet., Mem. at 82-88; Traverse at 5-55). Petitioner's attorney submitted a "Wende" brief in which he summarized the facts of the case, but did not raise any specific issues. See People v. Wende, 25 Cal. 3d 436, 436, 158 Cal. Rptr. 839 (1979). Further, the attorney asked the California Court of Appeal to independently review the record. The attorney did not withdraw from the case, but informed the court that he remained available to brief any issue upon invitation of the court. (Traverse, ex. T-4).

Thereafter, the California Court of Appeal ordered petitioner to raise any appealable issues in his own brief. (Return, ex. 3 at 62). Petitioner filed a document claiming that the evidence was insufficient to support his conviction and that the prosecution had suppressed exculpatory evidence. Id. The Court of Appeal reviewed the record, found no arguable issues, and affirmed the judgment. Id.

In Anders v. California, 386 U.S. 738, 738 (1967), the Supreme Court considered the scope of appellate counsel's duty under the Sixth Amendment when such counsel determines that an appeal is without merit. The Court held that if the attorney believes the appeal is frivolous, he or she may request to withdraw. Id. at 744. The request, however, must be accompanied by a brief referring to anything in the record that might arguably support an appeal. Id.

The Anders requirements are designed to assure that a defendant's right to counsel are not violated. McCoy v. Court of Appeals, 486 U.S. 429, 442 (1988). The reviewing court must satisfy itself that the attorney diligently and thoroughly searched the record for arguable claims, and then must determine whether the attorney correctly concluded that the appeal lacked merit. Penon v. Ohio, 488 U.S. 75, 81-82 (1988); McCoy, 486 U.S. at 442. In the Ninth Circuit, a proper Anders brief should identify the arguable issues and include a legal and factual analysis, rather than a simple recitation of the facts. See United States v. Griffy, 895 F.2d 561, 563 (9th Cir. 1990). If arguable issues exist, failure to present them to the court in counsel's brief violates the constitutional requirements of Anders. See id. at 562. Indeed, at oral argument held on May 9, 1995, respondents conceded that if any arguable issues existed which could have and should have been, but were not, raised, there are "serious problems" and prejudice is presumed.<sup>1</sup> Because we find there are arguable issues which counsel failed to raise and brief, we conclude that petitioner's appellate counsel was ineffective due to his failure to meet the Anders standards.<sup>2</sup>

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1. Respondents, of course, contend no arguable issues exist in this case.

2. The court further finds that respondents' argument under Teague v. Lane, 489 U.S. 288 (1989), is without merit. Teague holds that a new rule of criminal procedure cannot be retroactively applied in a habeas proceeding, unless the new rule falls into one of two narrow exceptions. Teague does not apply to new substantive rules. Chambers v. United States, 22 F.3d 939, 942-43 (9th Cir. 1994), vacated on other grounds, 47 F.3d 1015 (9th Cir. 1995).

"A new rule for Teague purposes is one where the result was not dictated . . . at the time the defendant's conviction became final . . . . The question is whether a state court considering the defendant's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he]

We recognize that the California Court of Appeal reviewed the record and found no issues of merit. We, however, are not bound by that determination. The existence or absence of non-frivolous issues on the record is a mixed question of law and fact which is reviewed de novo on a petition for writ of habeas corpus. See Sumner v. Mata, 455 U.S. 591, 597-98 (1982), vacated on other grounds, 464 U.S. 957 (1983). More importantly, our disagreement with the California Court of Appeal is not disrespectful because that court's determination was hampered by the inadequate brief prepared by counsel. Indeed, the reasoning behind the Anders rule is to ensure that counsel actually conducted a thorough review of the record. But, the California Court of Appeal was denied the opportunity to make such a determination with the aid of ready references to the record and legal authorities cited by counsel. Therefore, we review the record de novo for arguable issues.

An appeal as a matter of law is frivolous where none of the legal points are arguable on their merits. Neitzke v. Williams, 490 U.S. 319, 325 (1989) (citing Anders v. California, 386 U.S. 738, 744 (1967)). The parties are not in disagreement that for present purposes we can use the standard of an "arguable" issue as set forth in People v. Johnson, 123 Cal. App. 3d 106, 111-12, 176 Cal. Rptr. 390 (1981), cert. denied, 457 U.S. 1008 (1982). To be "arguable," an issue must be one which, in counsel's

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seeks was required by the Constitution." Goeke v. Branch, 115 S. Ct. 1275, 1277 (1995) [internal quotations and citations omitted].

In the instant case, the rule being applied in petitioner's case is substantive, not procedural. Even if the issue is deemed to be procedural, Anders clearly sets forth what appellate counsel and the appellate court must do. Further, this court is only applying the settled law of Anders, not an extension or modification thereof, and the standards therein as required before petitioner's state conviction became final.

professional opinion, is meritorious.<sup>3</sup> Id., 123 Cal. App. 3d at 109, 176 Cal. Rptr. at 391. Also, if the issue is successful on appeal and is resolved favorably to the appellant, the result must reverse or modify the judgment.<sup>4</sup> Id.

We need not identify each issue that might be arguable. Nor do we mean to suggest that only the issues discussed below are arguable. But, for present purposes, to see whether Anders was violated and prejudice presumed, we discuss only the following two examples which should have been, but were not, presented in petitioner's appellate brief. Moreover, we do not purport to resolve the merits of any of these issues nor intimate that they will necessarily result in success on appeal, as that is not the appropriate standard of review on this habeas petition.

### I. Adequacy of the Law Library

The right guaranteed by the Fourteenth and Sixth Amendments to waive one's right to counsel and proceed in pro per "is premised upon the right of the defendant to make a defense." Milton v. Morris, 767 F.2d 1443, 1445-46 (9th Cir. 1985) (citing Faretta v. California,

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3. Although respondents say there is no such thing as an arguable but non-meritorious claim, we find it is essentially a matter of semantics. Viewing an issue from counsel's ability to argue it in good faith with some potential for prevailing is not to say that it will necessarily achieve success. No one is suggesting that only issues which ultimately prevail are arguable. Rather, all that is required is that an issue has a reasonable potential for success.

4. Because we do not purport to decide the merits of any arguable issues, we also defer to the state appellate court to decide the merits of this second prong. We are satisfied for present purposes that at least some of the arguable issues, if they were decided in petitioner's favor, would have the effect of ultimately affecting the result of his appeal.



422 U.S. 806, 819-20 (1975)). An incarcerated defendant cannot meaningfully exercise this right without access to tools such as law books. *Id.* at 1446; *Taylor v. List*, 880 F.2d (sic) 1040, 1047 (9th Cir. 1989) (same).

The state trial judge was aware of the problems that petitioner was going to encounter with the law library. Indeed, the court warned petitioner, "if you are looking up law, you are not going to be able to find it because somebody has torn it out before you got there." (Aug. RT 19).<sup>5</sup> The court further told petitioner, "it's going to be a real mess for you. You are going to regret this for a long time . . . [because of] your fellow prisoners down in the county jail who have virtually destroyed the law library." (Aug. RT 20). Moreover, the court commented, "it's almost impossible as a pro per to prepare yourself a descent [sic] defense, especially given the law library." (Aug. RT 21).

It is true that the court may not have known exactly what materials petitioner would search out in the law library. In murder cases, however, there are common issues that a defendant will need to research, and by exercising his right to proceed *in pro per*, petitioner was not required to subject himself to the possibility that, through circumstances wholly beyond his control, he would be unable to prepare his defense. *Milton*, 767 F.2d at 1445.

Given this state of the record, we conclude that petitioner's inability to prepare an adequate defense was at least an arguable issue. Moreover, the "brief" filed by petitioner's appellate counsel did not even mention these circumstances in the purported recitation of the facts.<sup>6</sup>

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5. "RT" refers to the Reporter's Transcript.

6. Even if appellate counsel thought this argument and appeal were without merit, he still had a duty under *Anders* to advise the court of anything in the record which might arguably support the

## II. Counsel

### A. Advisory Counsel

Petitioner claims that he attempted to withdraw his waiver of counsel and request advisory counsel, or in the alternative, counsel. (Pet., Mem. at 38, 41).

On August 9, 1990, petitioner stated to the court, "I would like to have the assistance of counsel at the trial. I am not real good at public speaking. I am doing okay as far as the law work and stuff. Obviously, I am not a lawyer, but I need somebody to help me present the case." (Pet., ex. E, transcript dated Aug. 9, 1990, at 23). He further stated, "I do need some help presenting the evidence at the trial. I know the court is aware of the recent case laws in reference to appointing co-counsel and advisory counsel, so I don't need to quote that to the court; but I am asking for the assistance of counsel to help me present my defense." *Id.* at 24.

Prior to the August 9th hearing, petitioner had requested advisory counsel three times. (Aug. RT 18-20, 24-25; Pet., ex. E, transcript dated April 16, 1990, at 3-4, transcript dated July 13, 1990, at 6). The court denied these requests. (Aug. RT at 23-25; Pet., ex. E, transcript dated April 16, 1990, at 3, transcript dated July 13, 1990, at 6).

From the record, some of petitioner's request (sic) for advisory counsel may be considered ambiguous. It does not appear, however, that the judge attempted to clarify these requests. We recognize that petitioner does not have a constitutional right to advisory counsel. *United States v. Kienenberger*, 13 F.3d 1354, 1356 (9th Cir. 1994). Petitioner, however, does have the right to a considered exercise of judicial discretion. *People v. Bigelow*, 37 Cal.

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appeal.



3d 731, 742, 209 Cal. Rptr. 328, 333-34 (1984) (citing People v. Mattson, 51 Cal. 2d 777, 797, 336 P.2d 937 (1959) (the appointment of advisory counsel is within the sound discretion of the trial judge who is in the best position to appraise the situation)).

On these facts, it is unclear whether the judge focused on the proper legal standard. At the hearing held on January 24, 1990, the court responded to petitioner's request for advisory counsel by stating, "[t]he problem is you either get to go pro per or you have a lawyer." (Aug. RT 19). This is an apparent error of law. There would never be advisory counsel if a defendant could only proceed pro per or with a lawyer. Indeed, California courts frequently exercise their discretion to appoint advisory counsel. Bigelow, 37 Cal. 3d at 742, 209 Cal. Rptr. at 334. The trial judge, therefore, was at least required to exercise his discretion, especially given that petitioner was charged with murder.

#### B. Primary Counsel

Moreover, it is also arguable that petitioner was also requesting primary counsel. Fairly read, petitioner asked for the appointment of counsel as an alternative to advisory counsel. See United States v. Robinson, 913 F.2d 712, 718 (9th Cir. 1990), cert. denied, 498 U.S. 1104 (1991) (Sixth Amendment rights attach at critical stages, such as a motion for new trial or sentencing, even though a defendant had previously waived his right to counsel and represented himself at trial); Menefield v. Borg, 881 F.2d 696, 698 (9th Cir. 1989) (same). Because the judge failed to even consider whether petitioner was reasserting his right to counsel, it, too, is a non-frivolous issue which should have been raised by petitioner's appellate counsel.<sup>7/</sup>

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7. We reiterate that it is unnecessary for us to inquire into further violations of Anders because, as respondents concede, if there

### CONCLUSION

IT IS ADJUDGED that the petition for writ of habeas corpus is GRANTED, to the extent that petitioner shall be discharged from custody on the subject conviction unless the California Court of Appeal accepts jurisdiction over petitioner's direct appeal within 30 days; respondents shall notify the California Court of Appeal of this court's order.

Dated: This 24th day of October, 1995

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GEORGE H. KING  
United States District Judge

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are any arguable issues, prejudice is presumed.

## APPENDIX D

SUPREME COURT  
FILED  
OCTOBER 21, 1992  
ROBERT WANDRUFF CLERK  
DEPUTY

Second Appellate District, Division Four, No. B069441  
S028833

IN THE SUPREME COURT OF THE  
STATE OF CALIFORNIA

IN BANK

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LEE ROBBINS, Petitioner

v.

LOS ANGELES COUNTY SUPERIOR COURT, Respondent  
THE PEOPLE, Real Party In Interest

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Petition for review DENIED.

GEORGE  
Acting Chief Justice



SUPREME COURT  
FILED  
SEPTEMBER 29, 1993  
ROBERT WANDRUFF CLERK  
DEPUTY

ORDER DENYING WRIT OF HABEAS CORPUS

No. S033312

IN THE SUPREME COURT OF THE  
STATE OF CALIFORNIA

IN BANK

---

IN RE LEE ROBBINS

ON

HABEAS CORPUS

---

Petition for writ of habeas corpus DENIED on the merits.

LUCAS  
Chief Justice

SUPREME COURT  
FILED  
JANUARY 26, 1994  
ROBERT WANDRUFF CLERK  
DEPUTY

ORDER DENYING WRIT OF HABEAS CORPUS

No. S036062

IN THE SUPREME COURT OF THE  
STATE OF CALIFORNIA

IN BANK

---

IN RE LEE ROBBINS

ON

HABEAS CORPUS

---

Petition for writ of habeas corpus DENIED. (See In re  
Dixon (1953) 41 Cal.2d 756, 759.)

LUCAS  
Chief Justice

## APPENDIX E



COURT OF APPEAL - SECOND DIST.  
FILED  
DECEMBER 12, 1991  
ROBERT N. WILSON, CLERK

NOT FOR PUBLICATION IN  
THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE  
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,	)	No. B054733
	)	
Plaintiff and	)	(Super.Ct.No. A481636)
Respondent,	)	
	)	
v.	)	
	)	
LEE ROBBINS,	)	
	)	
Defendant and	)	
Appellant.	)	
_____	)	

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert W. Armstrong, Judge. Affirmed.

David H. Goodwin, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance on behalf of the People, Plaintiff and Respondent.

Lee Robbins appeals from the judgment entered following a jury trial that resulted in his conviction of second degree murder with the use of a firearm and grand theft of an automobile. (Pen. Code, §§ 187, 487, subd. 3,

12022.5, subd. (a).) He was sentenced to 17 years to life in state prison. We appointed counsel to represent him on this appeal.

After examination of the record, counsel filed an "Opening Brief" in which no issues were raised. On October 28, 1991, we advised appellant that he had 30 days within which to personally submit any contentions or issues which he wished us to consider. In a six-page handwritten document filed November 15, 1991, appellant claims that the evidence is insufficient to support his conviction and he was denied due process by the People's suppression of exculpatory evidence. These claims find no support in the record.

We have examined the entire record and are satisfied that appellant's attorney has fully complied with his responsibilities and that no arguable issues exist. (People v. Wende (1979) 25 Cal.3d 436, 441.)

The judgment is affirmed.

NOT FOR PUBLICATION IN  
THE OFFICIAL REPORTS

COOPER, J.\*

We concur:

WOODS (Arleigh), P.J.

EPSTEIN, J.

\*Assigned by the Chairperson of the Judicial Council.

APPENDIX F



FILED  
 SEPTEMBER 24, 1998  
 CATHY A. CATTERSON, CLERK  
 U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEE ROBBINS,	)	No. 95-56640
	)	
Petitioner-Appellee,	)	D.C. No. CV-94-01157-GHK
	)	
v.	)	
	)	
GEORGE SMITH, Warden,	)	
California Department of	)	
Corrections,	)	
	)	
Respondent-Appellant.	)	
	)	
<hr/> LEE ROBBINS,	)	No. 96-55063
	)	
Petitioner-Appellant,	)	D.C. No. CV-94-01157-GHK
	)	
v.	)	
	)	
GEORGE SMITH,	)	ORDER
	)	
Respondent-Appellee.	)	
<hr/>	)	

Before: HUG, Chief Judge, PREGERSON and  
 REINHARDT,  
 Circuit Judges.

The panel has voted to deny the petition for  
 rehearing and to reject the suggestion for rehearing en  
 banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

The motion for clarification and for a stay of the mandate and for leave to file a supplemental rehearing petition is DENIED.

FILED  
OCTOBER 26, 1998  
CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEE ROBBINS,	)	No. 95-56640
	)	
Petitioner-Appellee,	)	D.C. No. CV-94-01157-GHK
	)	
v.	)	
	)	
GEORGE SMITH, Warden,	)	
California Department of	)	
Corrections,	)	
	)	
Respondent-Appellant.	)	
	)	
<hr/> LEE ROBBINS,	)	No. 96-55063
	)	
Petitioner-Appellant,	)	D.C. No. CV-94-01157-GHK
	)	
v.	)	
	)	
GEORGE SMITH,	)	ORDER
	)	
Respondent-Appellee.	)	
<hr/>	)	

Before: HUG, Chief Judge.

The "Motion to Stay the Mandate to Permit Respondent to File a Petition for Writ of Certiorari" is GRANTED.

FILED  
 DECEMBER 2, 1998  
 CATHY A. CATTERSON, CLERK  
 U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEE ROBBINS,	)	No. 95-56640
	)	
Petitioner-Appellee,	)	D.C. No. CV-94-01157-GHK
	)	
v.	)	
	)	
GEORGE SMITH, Warden,	)	
California Department of	)	
Corrections,	)	
	)	
Respondent-Appellant.	)	
	)	
<hr/> LEE ROBBINS,	)	No. 96-55063
	)	
Petitioner-Appellant,	)	D.C. No. CV-94-01157-GHK
	)	
v.	)	
	)	
GEORGE SMITH,	)	ORDER
	)	
Respondent-Appellee.	)	
<hr/>	)	

Before: HUG, Chief Judge.

The Motion to Extend the Stay of Mandate an  
 additional 30 days is GRANTED.



## APPENDIX G

IN THE COURT OF APPEAL OF THE  
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE OF THE STATE	)	
OF CALIFORNIA,	)	2d Crim. No. B054733
	)	Superior Court
Plaintiff and Respondent,	)	No. A 481636
	)	
vs.	)	
	)	
LEE ROBBINS,	)	
	)	
Defendant and Appellant,	)	
	)	

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APPEAL FROM THE SUPERIOR COURT OF LOS  
ANGELES COUNTY  
HONORABLE ROBERT W. ARMSTRONG,  
JUDGE PRESIDING

APPELLANT'S OPENING BRIEF

REQUEST FOR INDEPENDENT REVIEW OF  
RECORD PURSUANT TO  
PEOPLE v. WENDE (1979) 25 Cal. 3d 436

David H. Goodwin  
P.O. Box 93579  
Los Angeles, CA 90093-0579  
(213) 666-9960

Attorney for Appellant

## STATEMENT OF THE CASE

This is an appeal pursuant to Penal Code Section 1237 from a judgment of conviction of violation of one count each of Penal Code Section 187(a)<sup>1</sup> (murder) and 487(3) (Grand theft of an automobile).

Appellant was charged by information with one count of violation of Section 187(a) and one count of Section 487(3). It was further alleged that in the commission of the murder appellant personally used a firearm within the meaning of Sections 1203.06(a)(1) and 12022.5 (CT 106-107).

On December 19, 1989, appellant was arraigned in the Superior Court for the County of Los Angeles, Department SE J, before the Honorable J. A. Torribio. At that time Appellant entered a plea of not guilty (CT 108).

On December 20, 1989, Judge Torribio suspended proceeding pending a determination of appellant's competency pursuant to § 1368 (CT 109).

On March 1, 1990, the Honorable C. Robert Simpson, presiding in Department SE J, found appellant competent to stand trial, and proceedings were resumed. On that date the court also denied appellant's motion pursuant to People v. Marsden (1970) 2 Cal.3d 118 (CT 143).

On March 7, 1990, Judge Simpson denied another Marsden motion, and granted appellant's request to proceed in propria persona (CT 144).

On August 17, 1990, the cause was called to trial before the Honorable R. Armstrong, presiding in the Superior Court for the County of Los Angeles, Department SE F (CT 200).

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1. All further undesignated statutory references are to the Penal Code.

Superior Court for the County of Los Angeles, Department SE F (CT 200).

On August 22, 1990, the jury returned a verdict of guilty of one count second degree murder and one count of grand theft of an automobile. It was further found that in the commission of the murder appellant personally used a firearm within the meaning of Sections 12022.5(a) and 1203.06(a)(1) (CT 248-251).

On September 5, 1990, Judge Armstrong sentenced appellant as follows: For Count 1, a sentence of fifteen years to life imprisonment, plus 2 years pursuant to Section 12022.5 for a total of seventeen years to life. For Count 2, the mid term sentence of two years imprisonment, to be served consecutively to the sentence imposed for Count 1. However, the sentence for Count 2 was stayed, that stay to become permanent pending the completion of the sentence for count 1. Appellant was given credit for 658 days (CT 251-252).

On September 6, 1990, a Notice of Appeal was filed bringing this case before this Court (C.T. 253-254).

## STATEMENT OF THE FACTS

Alvin York Curtis, lived next door to Spaulding (the decedent in this case) during the summer of 1988<sup>2</sup>. During that summer, appellant was living in the converted garage of Spaulding's residence (RT 75-76, 91). At about 6:30 p.m. on December 31, 1989, Mr. Curtis heard two sets of gunshots, separated from each other by a pause of a couple seconds. Each set consisting of several shots, and each set sounding distinct from the other (RT 76-78). At that time Mr. Curtis thought that the sounds were gunshots from New Year's Eve revelers (RT 78-79).

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2. Unless otherwise indicated all events referred to herein occurred on December 31, 1988.



Spaulding had frequent arguments with his wife, and at one time he was arrested for assaulting her. (RT 81, 89-90).

Dona Medina, another neighbor of the victim, also heard gunshots at that time, and described them as having two distinct sounds, the first three having a sharp sound, and the next four or five shots having a more muffled sound. (RT (84-85).

Mrs. Medina knew of one occasion where a woman claimed that Spaulding had beaten her because she would not sleep with him (RT 89). Mrs. Medina also testified that on one occasion Spaulding's house was vandalized, and Spaulding then made a phone call from her house, telling the person he called that he knew that "Lee" had been the one who vandalized his house (RT 89).

Maria Romero, another neighbor of Spaulding heard the shots (RT 95). Shortly after hearing the shots she saw a man standing in front of her house. The person told her that he was looking for his dog who ran away after being scared by fireworks (RT 96-98).

Mrs. Romero and her daughter then went to the Fayva shoe store where they purchased some shoes. The receipt from the shoe store indicated the time of purchase as 6:47 p.m. (RT 98, 100). Mrs. Romero was unable to identify the man who was looking for the dog, although she described him to the police as being five feet six inches to five feet eight inches, 25 to 30 years old, and having dark short curly hair (RT 102, 104-105).

Stanley Curatola, Spaulding's roommate, testified that he left their residence on New Year's Eve before noon (RT 110-111), and spent the day with a variety of friends at various bars and restaurants. He returned to his residence, along with some of his friends from the bars, at about 8:00 (RT 111-114). Returning home he found that a rear window had been broken. Opening the curtain to the window he saw Spaulding lying on his face

on the floor in a pool of blood (RT 114-116). Spaulding's gun was on the floor next to him. Curatola told his friend to call the police, and waited outside until they arrive (RT 117).

Curatola testified that he knew that Spaulding had been having an ongoing dispute with another roommate, whom Curatola eventually discovered to be appellant. (RT 118, 120)

Arriving at the Spaulding residence at about 11:00 p.m., Deputy Sheriff Cox observed a Smith and Wesson .38 caliber revolver (People's Exhibit 9) with five expended rounds lying next to Spaulding's body (RT 170, 172-173, 176). Bullet holes were observed in the door to the service porch, going from the inside of the residence to the outside, and the window on that door had been shattered (RT 173-174).

When Deputy Cox interviewed appellant after his arrest, appellant admitted being in the area of the Spaulding residence around dusk on December 31, 1988 (RT 180). In that statement appellant stated that he was on his way home when he stopped to let his dog relieve itself. He lost sight of the dog, and had asked a "Mexican couple" at the corner of Claretta and Gradwell if they had seen it. He later found the dog in a parking lot across the street (RT 180-181).

Richard Lee, appellant's brother-in-law testified that in December of 1988, appellant was living in a trailer in the backyard of Lee's residence (RT 125). Some time in mid December, Mr. Lee asked appellant to stay at another property he owned in Santa Fe Springs, and watch that property for Lee, but that appellant had returned to Mr. Lee's residence on at least one occasion in January of 1989, and that appellant would have had access to Mr. Lee's garage (RT 125-126, 141-142).

As part of a firearm collection, Mr. Lee owned a .45 caliber Colt Commander automatic pistol (People's

Exhibit 3). That weapon was normally kept in a gun safe in his garage. (RT 126-128).

Lee testified that appellant had access to the garage. Although the gun safe was usually locked, Mr. Lee kept the lock set so that he only had to roll the combination to zero so that he had easy access to the safe. Mr. Lee was sure that appellant had seen him open the safe in that manner (RT 128-129).

Some time in mid December this gun disappeared from Mr. Lee's possession. It later reappeared in mid January. Mr. Lee did not know where the weapon was during this time (RT 129, 143).

Mr. Lee testified that another gun had also disappeared from his collection in late November or early December, when he had taken it to a gun shop in Riverside, accompanied by appellant, to have some work done on the gun. (RT 129-131)

Mr. Lee further testified that he had loaned appellant People's Exhibit 3 earlier in October of 1988, and appellant had returned the gun on November (RT 132-133).

Mr. Lee testified that when the police initially visited him in January of 1989 he had lied to them, telling them that he only had one .45 automatic, when, in fact, he had five. Mr. Lee had taken the weapons to his father's house, where he had left them for a month or two, because he was concerned that if the police took the weapons they would not return them (RT 133-134).

Mr. Lee further testified that the police visited him again in October of 1989, and at that time he admitted that he lied earlier. He also gave them several .45 automatics, including People's Exhibit number 3. At the time that he handed over People's Exhibit number 3, it had an electron sight on it that had been put on the gun after he had retrieved it from his father's house (RT 134-136).

Mr. Lee testified that on January 10, 1989, appellant had asked him if he had been interviewed by the police. He told Robbins not to let the police have the gun, because he was afraid that the police would dummy up ballistics tests and frame him for Spaulding's murder (RT 145-146).

At that time appellant asked Lee for a vehicle. Lee offered to let appellant use a Blazer that was at Lee house. Lee and appellant went to Lee's place of work in a truck that Lee was borrowing from his father. Lee left the keys to that truck of his office desk, and later discovered that the keys, the truck and appellant were missing (RT 146-148).

Some time later the truck was discovered in Arizona near the New Mexico border. Lee had not give appellant permission to take the truck (RT 148-149).

On January 7, 1989, Deputy Cox spoke to Lee and requested permission to search the trailer on Lee's property that appellant had been staying in. (RT 186-187). On January 12th, Cox again went to Lee's residence where he searched the garage (RT 192).

On October 3, 1989, Cox again spoke to Lee, and Lee informed Cox that he had been lying to Cox about the number of guns that he had. Lee then handed over all his .45s to Cox, and Cox had the weapons test fired. He returned all of the weapons to Lee, and after the test results were complete he re-obtained People's Exhibit 3 (RT 195-197).

Deputy Cox further testified that the police had removed a piece of carpeting from the Spaulding residence because they had initially thought that it was blood stained. However, that carpeting was destroyed when tests determined that the stain was not blood (RT 205-206).

He testified that because of the possibility that the stain on the carpet may have been blood and the fact that one weapon had apparently been fired from inside



the house to the outside, the initial bulletin that they had issued mentioned that the suspect might have been wounded (RT 206-207).

It was stipulated that appellant had never received any gunshot wounds (RT 223-224)

Dr. Sara Reddy, a deputy medical examiner for the Los Angeles County coroner's office, performed the autopsy on Spaulding. She determined that Spaulding had been shot five times, and gave multiple gunshot wounds as the cause of death (RT 219). She testified that death would have been "very quick" (RT 221).

On the afternoon of December 31, 1988, appellant was visiting Pat Cano in Hawaiian Gardens (RT 228-229, 269-270). At that time he showed Vincent Nylin, Cano's boyfriend, a .45 Colt commander and a TEC-9 nine-millimeter revolver (RT 237-239).

Deputy Van Horn of the scientific Services Bureau, recovered a .38 caliber Smith and Wesson revolver, several expended .45 Caliber cartridge cases, and bullets from a .45 caliber and a .38 caliber gun (RT 242-243).

The .45 caliber cartridge casings were found outside the side door to the residence (RT 246). Two .45 caliber bullets were recovered from the rear wall (RT 247-248). Four .38 caliber bullets were found in the area around the rear door (RT 249).

After testing the weapons involved, Deputy Van Horn concluded that the .38 caliber bullets found were fired from the Smith and Wesson recovered at the scene. He further found that the .45 caliber bullets recovered from the scene and the bullets given to him by the Coroner's office were all fired from People's Exhibit Number 3 (RT 254, 256-257).

In Deputy Van Horn's opinion, the bullets from the .45 caliber were fired from outside the house to the inside, while the bullets from the .38 caliber were fired from the inside to the outside (RT 264).

## ARGUMENT

APPELLANT REQUESTS THAT THIS COURT INDEPENDENTLY EXAMINE THE ENTIRE RECORD ON APPEAL

Pursuant to People v. Wende (1979) 25 Cal. 3d 436, counsel requests that this court independently review the entire record on appeal for arguable issues.

Present counsel has advised appellant that appellant may file a supplemental brief with the court within 30 days and may request the court to relieve present counsel. Present counsel remains available to brief any issues(s) upon invitation of the court. (See Declaration attached hereto.)

DATED: October 1, 1991

Respectfully submitted,

---

David H. Goodwin  
Attorney for Appellant

DECLARATION OF DAVID H. GOODWIN  
IN SUPPORT OF REQUEST FOR  
INDEPENDENT JUDICIAL REVIEW OF  
THE ENTIRE APPELLATE RECORD

I, David H. Goodwin, declare as follows:

I am the attorney appointed to represent appellant, Lee Robbins, in his appeal following judgment of conviction for violation of Penal Code §§ 187(a) and 487(3).

I have reviewed the entire record on appeal, consisting of the Clerk's Transcript (1 volume), the Reporter's Transcript (1 volume), and the Augmented Reporter's Transcripts (1 volume); examined the superior court file and exhibits from appellant's trial; and discussed appellant's case with trial counsel.

I have written to appellant at his current address, Lee Robbins, E-69926, 1-1A-30, P.O. Box W, Repressa, Ca 95671, explaining my evaluation of the record on appeal and my intention to file this pleading. I have also informed him of his right to file a supplemental brief. I have sent appellant the transcripts of the record on appeal and a copy of this brief.

I do not at this time move to withdraw as counsel of record for appellant and I remain available to brief any issues that the Court requests. I have also advised appellant that he may request this court to relieve me.

I declare under penalty of perjury that the foregoing is true and correct and that I signed this declaration on October 1, 1991, at Los Angeles, California.

\_\_\_\_\_  
David H. Goodwin

PROOF OF SERVICE BY MAIL (C.C.P. SEC. 1013.A, 2015.5)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a resident of the aforesaid county; I am over the age of eighteen years and not a party to the within entitled action; my business address is

\_\_\_\_\_  
P. O. Box 93579, Los Angeles, Ca 90093-0579

On October 1 1989 I served the within Statement by Counsel on Appeal Pursuant to People v. Wende on the interested parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as follows:

The Attorney General  
300 South Spring St.  
Room 500  
Los Angeles, Ca 90013

Hon. Robert W. Armstrong  
Superior Court, Dept. SE F  
12720 Norwalk Blvd.,  
Norwalk, Ca 90650

District Attorney's Office  
12720 Norwalk Blvd., Room 201  
Norwalk, Ca 90650

Lee Robbins, E-69926  
1-1A-30  
P.O. Box W  
Repressa, Ca 95671

Executed on October 1, 1991, at Los Angeles, California  
I declare under penalty of perjury that the foregoing is true and correct.

\_\_\_\_\_  
DAVID H. GOODWIN



## APPENDIX H

## Declaration of David Goodwin

I, David Goodwin, hereby declare as follows:

1. I am a attorney licensed to practice law in California.
2. I was the appointed attorney in People v. Robbins, Court of Appeal No. B054733.
3. It has been 39 months since I filed the brief in this matter, and I do not recall all of the specifics. However, to the best of my recollection, appellant pointed out many issues to me. I attempted to consider most of the issues he mentioned. As to some, I thought they not were meritorious on their face. As to the others that I attempted to research I thought they were not meritorious.
4. Prior to the filing a brief, I filed with consulted with California Appellate Project, and received their permission to file a Wende brief.

I declare under penalty of perjury, under the laws of the United States, that the foregoing is true and correct.

Executed: (Date illegible)

---

David H. Goodwin

APPENDIX I

FILED  
CLERK, U.S. DISTRICT COURT  
NOVEMBER 1, 1995  
CENTRAL DISTRICT OF CALIFORNIA  
BY DEPUTY

ENTERED  
CLERK, U.S. DISTRICT COURT  
NOVEMBER 9, 1995  
CENTRAL DISTRICT OF CALIFORNIA  
BY DEPUTY

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Jesus F. Marroquin,	)	
	)	CV 95-2477-KN (SH)
Petitioner,	)	
	)	ORDER Re: Habeas Corpus
	)	Petition
v.	)	
	)	
K.W. Prunty, Warden,	)	
	)	
Respondent.	)	
	)	

Pursuant to 28 U.S.C. § 636(b)(1)(C), the Court has reviewed the Final Report and Recommendation of the United States Magistrate Judge. The Court declines to follow the recommendations of the Magistrate Judge and hereby **DENIES** the Petition.

Petitioner alleges that the California Court of Appeal's failure to request further briefing from his appellate counsel and its denial of his request for new counsel to brief his appellate issues prior to ruling on the merits violated his Sixth and Fourteenth Amendment right to counsel. The United States Supreme Court in Penson



v. Ohio, 488 U.S. 75, 80 (1988) held that if there are nonfrivolous issues on appeal, the appellate court "must, prior to the decision, afford the indigent the assistance of counsel to argue the appeal." In California, appellate counsel for an indigent may file a brief containing only a statement of the facts and the applicable law if counsel believes that there are no meritorious issues on appeal. People v. Feggans, 67 Cal.2d 444 (1964). If appellate counsel files such a brief, the appellate court "must then itself conduct a full examination of all the proceedings to decide whether the case is wholly frivolous . . . . [O]nly after the appellate court finds no nonfrivolous issues for appeal, may the court proceed to consider the appeal on the merits without the assistance of counsel." Penson, supra, at 80 (internal quotations and brackets omitted).

In the instant case, Petitioner was appointed appellate counsel. Counsel filed a "no-merit brief" pursuant to Feggans, having determined that there were no meritorious issues on appeal. The California Court of Appeal then made its own independent determination that the appeal was frivolous. The Court of Appeal in its opinion did address the merits of one issue: the trial court's denial of Petitioner's motion to exclude evidence of a prior felony conviction. However, although the appellate court addressed the merits of this issue (and determined that it was proper to admit such evidence), the court carefully pointed out that a "review of the record reveals that, despite extensive argument on the subject and the trial court's denial of the motion to exclude, the prosecutor never introduced the conviction into evidence." Thus, while the admission of the prior felony conviction would have been an arguable issue on appeal, the fact that the conviction was never admitted rendered the issue moot. The court went on to state that "Defendant's other contentions are equally unsupported by the record" and "no arguable issues exist."

Having conducted its own independent review of the record and determined that all issues raised on appeal were frivolous, the Court of Appeals had no obligation to either request further briefing from Petitioner's appellate counsel, or appoint new appellate counsel for Petitioner to brief the issues on appeal prior to ruling on the merits of Petitioner's appeal. The Court of Appeals fully complied with the requirements of Penson v. Ohio.

Petitioner's assertion that he was denied the assistance of appellate counsel in violation of the Sixth and Fourteenth Amendment has no merit, as Petitioner failed to raise any non-frivolous issues on appeal. The Court therefore **DENIES** the Petition for a Writ of Habeas Corpus.

IT IS SO ORDERED.

DATED: \_\_\_\_\_

\_\_\_\_\_  
DAVID V. KENYON  
UNITED STATES DISTRICT JUDGE

14

Supreme Court, U.S.  
FILED  
JAN 23 1999  
CLERK

No. 98-1037

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

---

GEORGE SMITH, Warden, *Petitioner,*

v.

LEE ROBBINS, *Respondent.*

---

ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

MOTION FOR LEAVE TO FILE OPPOSITION  
TO WRIT FOR PETITION OF CERTIORARI *IN FORMA PAUPERIS*

---

Ronald J. Nessim\*  
Elizabeth A. Newman  
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\*Counsel of Record for Respondent

32 pp

COPY

**MOTION FOR LEAVE TO FILE OPPOSITION**

**TO PETITION FOR WRIT OF CERTIORARI IN FORMA PAUPERIS**

Pursuant to Supreme Court Rule 39.1, Respondent Lee Robbins hereby respectfully requests leave of this Court to proceed in *forma pauperis*. Robbins is indigent. He has been represented both before the United States District Court and the United States Court of Appeals by Ronald J. Nessim, who was appointed to represent him under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A.

Pursuant to Supreme Court Rules 15.3 and 39.2, Robbins attaches to this motion his brief in opposition to Smith's petition for a writ of certiorari.

Dated: January 28, 1999      Respectfully submitted,

RONALD J. NESSIM\*  
ELIZABETH A. NEWMAN  
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By: 

RONALD J. NESSIM

\*Counsel of Record for Respondent  
Lee Robbins

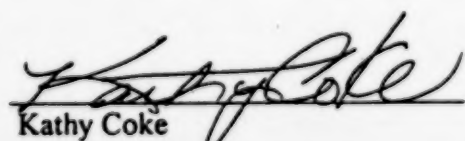
**CERTIFICATE OF SERVICE**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1875 Century Park East, 23rd Floor, Los Angeles, California 90067-2561.

On January 28, 1999, I served the foregoing document described as **MOTION FOR LEAVE TO FILE OPPOSITION TO PETITION FOR WRIT OF CERTIORARI IN FORMA PAUPERIS** on the interested party in this action by placing a true copy thereof in sealed envelopes and arranging for mailing same to the parties listed below:

Carol Frederick Jorstad, Esq.  
Deputy Attorney General  
300 South Spring Street, Suite 500  
Los Angeles, CA 90013

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, that I am employed in an office of a member of the bar of this Court at whose direction this service was made, and that I executed this document on January 28, 1999, at Los Angeles, California.

  
Kathy Coke

---

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

---

GEORGE SMITH, Warden, Petitioner,

v.

LEE ROBBINS, Respondent.

---

ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

Ronald J. Nessim\*  
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\*Counsel of Record for Respondent

QUESTIONS PRESENTED

1. Did the Ninth Circuit properly find that the no-merit brief filed on direct appeal by appointed counsel for Respondent Lee Robbins was constitutionally defective under *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967)?
2. Should the Ninth Circuit have flouted this Court's mandate in *Penson v. Ohio*, 488 U.S. 75, 109 S. Ct. 346 (1988), which holds that a constitutionally defective *Anders* brief constitutes constructive denial of counsel on appeal?
3. Did the Ninth Circuit correctly find that granting Robbins relief under *Anders* did not violate *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989), given that Robbins' conviction became final in 1992, twenty-five years after *Anders* was decided?



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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

---

No. 98-1037

---

GEORGE SMITH, Warden, Petitioner,

v.

LEE ROBBINS, Respondent.

---

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

Lee Robbins respectfully requests that this Court deny the petition of George Smith, Warden ("the state"), for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

STATEMENT OF THE CASE

A. Robbins' State Trial

Lee Robbins was an incarcerated defendant charged with first-degree murder in California. His public defender repeatedly ignored his requests to investigate the case and did not even want to file a discovery motion on his behalf. SER 2-6, 15-17.<sup>1</sup> When Robbins, concerned over his defender's failure to

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1. "CR" refers to the district court docket; "CT" to the clerk's transcript of Robbins' state trial; "ER" to the state's excerpts

investigate the case, filed a motion for new counsel, his attorney did not present any reasons for his dilatory efforts. Instead, he argued to the court that the evidence against his client was "overwhelming." SER 6. See *People v. Marsden*, 2 Cal.3d 118, 84 Cal.Rptr. 156 (1970) (establishing procedure for requesting new counsel). At a subsequent *Marsden* hearing, the public defender admitted that he still had not given Robbins copies of vital documents and conceded that, since his appointment more than five months before, he had spent no more than four hours discussing the case with Robbins. ER 97, 101-02. In the face this lack of advocacy on his behalf, and the court's unwillingness to appoint new counsel, Robbins had no choice but to defend himself. See ER 105, 108; SER 38-39, 50. His decision to do so cannot be said to have been voluntary in any meaningful sense of the word.

Although the court had such strong doubts of Robbins' mental condition that it ordered a competency hearing, it allowed Robbins to waive his constitutional right to counsel. *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525 (1975); SER 19-20 (court orders a competency hearing when Robbins states that the mental

---

of record before the Court of Appeals; and "SER" to Robbins' supplemental excerpts of record before the Court of Appeals.

retardation of the victim's dog is material to his defense); SER 31-49 (Faretta hearing). Yet the court informed Robbins that the law library at the county jail would not be of any use to him because other inmates had torn out all of the relevant cases, and told Robbins that this was simply one of the consequences of self-representation - that he could not turn to the court for help. ER 39-40.

The court labeled Robbins' written pretrial motions "garbage." ER 69-70. Yet, although Robbins requested at least five times that the court appoint counsel to assist him, the court refused to appoint either advisory or trial counsel. ER 46-50 (April 16, 1990); ER 37-45 (May 2, 1990); SER 56-59 (motion filed July 6, 1990); SER 62-63 (writ of habeas corpus dated July 13, 1990); ER 60-73 (August 9, 1990). In fact, the court did not even attempt to determine whether Robbins was asking for trial counsel or for advisory counsel, or whether the circumstances warranted the appointment of counsel at all. It simply treated all of Robbins' requests as motions for advisory counsel and denied them on the ground that it would never force an attorney to (in its words) "play second fiddle" to a client. ER 70.

Robbins was indigent and incarcerated and, of course, was without legal training. He had no meaningful opportunity to

investigate or prepare his case. The court granted him only \$500 for investigation and denied him promised discovery, including the victim's rap sheet. SER 55 (\$500 granted for investigation); SER 58 (motion for additional funds and expert witness); SER 26, 29 (discovery motion, including request for rap sheet); ER 23-24 (prosecutor and court agree that Robbins is entitled to all material sought in his discovery motion); SER 68, 125 (denial of rap sheet).

Exculpatory material, including the County Coroner's official death certificate, established that the victim had died at an hour when the prosecution's own witnesses testified that Robbins was far from the murder site. SER 427-32 (establishing that the victim was shot at 10:00 p.m.); SER 224 (prosecution witnesses and other evidence show that Robbins was far from the crime scene at 10:00 p.m.). Yet this material, which directly contradicted the prosecutor's theory of the case, was not provided to Robbins. SER 433 (prosecutor presents his theory that the victim was shot at 6:30 p.m.); SER 435, ¶ 2 (exculpatory material was not produced to Robbins). The court had assured Robbins that it would serve his seventeen trial subpoenas, including several to police officers, but none of his witnesses was made available, and he was compelled to rest his case without



putting on a defense. ER 55-57; SER 440, ¶ 2; SER 440, ¶ 3; SER 345.

Robbins thus found himself without the funds to hire an investigator, without representation or advice of counsel, without any of the witnesses he had subpoenaed, and without the key exculpatory evidence in the case. The results were, unfortunately, predictable. Robbins declined to hold the prosecutor to an earlier agreement to sever a charge of grand theft auto, did not exercise any challenges during *voir dire*, did not make an opening statement, and never raised any sustainable evidentiary objections. SER 72, 104, 106-16, 130, and generally.

As a result, he was tried not only for murder but for fleeing the state afterwards in a stolen truck, and he was judged by a jury that included a man whose police-officer son had often worked with the prosecutor, a woman who had been robbed at gunpoint and whose sister and two brothers-in-law had all been victims of car theft, and a woman who had witnessed an armed robbery and whose son had been beaten so severely during another robbery that his skull was fractured. SER 46-47, 88-89, 98-100,

102.<sup>2</sup> In contrast, the prosecutor apparently excused every black and Hispanic potential juror. CR 1 at 54.

Although Robbins cross-examined the prosecution's witnesses to the best of his ability, his lack of legal training figured prominently in the proceedings. Not only were his attempts to impeach prosecution witnesses inartful, but, more importantly, he failed to introduce evidence that he was in jail on an unrelated misdemeanor at the time when, according to one of the prosecution's witnesses, certain key events allegedly occurred. SER 222-23 (Robbins inquires on cross-examination about a witness' allegedly incestuous relationship with his sister); SER 201-04; SER 362-63; SER 434 (failure to introduce exculpatory evidence). He had no idea how to make a closing statement and was repeatedly hamstrung by the prosecutor's objections during closing. SER 360-66. In upholding one such objection, the court commented on Robbins' exercise of his fifth amendment right to remain silent. SER 365. Needless to say, Robbins never argued

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2. Although California Rule of Court 228.1 required the court to conduct a pre *voir dire* conference, the court failed to do so. See CR 1 at 50-53. Had the court conducted such a conference, Robbins might have understood the purpose of *voir dire* and might have exercised his peremptory challenges.



the presumption of innocence or the prosecutor's high burden of proof. SER 360-66.

Robbins' lack of legal training continued to hamper him during the conference on jury instructions. The evidence showed that a gun battle had taken place between the victim and the perpetrator, but when the court asked Robbins whether he wished the jury to be given a manslaughter instruction, Robbins declined, saying, "I am charged with murder and tried with murder." SER 229-32, 320, 335-38. No manslaughter instruction was given. SER 338-45.

Despite all of these hardships, however, the case was a close one. The prosecutor's case rested solely on circumstantial evidence. The jury deliberated for several hours over the course of two days, asked for a read-back of certain testimony, and posed certain questions of the court (which were largely unanswered) before ultimately convicting Robbins of second degree murder. SER 397-402. In so doing, the jury rejected the prosecutor's request for a verdict of first degree murder. SER 359; CT 250.

Contrary to the public defender's pretrial argument to the court, the evidence against Robbins could hardly be characterized as "overwhelming." SER 6. Indeed, it was entirely

circumstantial. There were no eye witnesses to the crime. The gun identified as the murder weapon was recovered from another man who initially tried to hide it from the police. SER 183-84, 189. One of the prosecution's own witnesses testified that he was with Robbins until two hours after the prosecution claimed that the murder had been committed. SER 290-91.

In addition, as noted above, the time of the victim's death, around which the prosecution built its case, was belied by a number of documents, including the County Coroner's official death certificate, which the prosecutor later admitted was never produced to Robbins. See SER 427, 433, 437. There were other inconsistencies in the prosecutor's case as well. See, e.g., SER 158, 292-93 (witness, who saw a man near the crime scene at the time that the prosecutor contended victim had died, could not identify Robbins; the clothing worn by the man she saw did not match the clothing that Robbins wore that evening); SER 196, 290 (witness testified that Robbins showed him an alloy and blue gun on the night of murder, but the murder weapon was black); SER 271-72 (inconsistencies between a witness' trial testimony and her initial statements to the police).

Had Robbins been properly represented by counsel, he might well have convinced a jury that there was at least a reasonable

doubt about the identity of the murderer. Because Robbins was acting *in pro per* under the most adverse circumstances, however, he effectively had no chance to put on a competent defense, and was convicted on the basis of inconsistent and relatively weak circumstantial evidence.

**B. Robbins' Direct Appeal**

Faced with this record, replete with non-frivolous issues, Robbins' appointed appellate counsel, David Goodwin, filed a no-merit brief on direct appeal. Even if such a brief had been appropriate in this case - and it clearly was not - the brief filed by Robbins' counsel was constitutionally defective.

*Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967), imposes a three-part duty on court-appointed appellate counsel. First, counsel must vigorously argue any non-frivolous issues that can be asserted on the client's behalf. Second, if, after diligently reviewing the file, counsel concludes that no non-frivolous issues exist, he or she should seek to withdraw. Third, counsel must accompany the motion to withdraw with a brief that cites any potentially helpful portions of the record and any legal authorities that might aid the client. The appellate court can then use the brief for guidance when it conducts its own

complete review of the record. 386 U.S. at 744-75, 87 S. Ct. at 1400.

The brief filed on Robbins' behalf failed to satisfy any of *Anders'* requirements. First, Goodwin improperly concluded that the proceedings that led up to Robbins' conviction and sentence were so error-free that no issue deserved briefing. He also violated the second and third prongs of *Anders* by failing to seek to withdraw and by failing to provide the requisite citations either to the record or to helpful legal authorities. He made no effort to direct the appellate court's attention to the pertinent factual issues, or to cite appropriate legal authorities. His brief contained nothing of use to Robbins, his client, and cannot seriously be considered the work of an advocate.

Goodwin's brief was a skimpy eight-and-one-half pages. It consisted of a two-page review of the procedural history of the case that omitted much of the relevant procedural history, a six-page summary of the trial that devoted one or two sentences to the testimony of each witness, and a one-half-page "argument" in which Goodwin merely requested that the court independently review the record for arguable issues. SER 413-24. The brief is devoid of any sign of advocacy.



Goodwin's purported summary of the record did not include any discussion of Robbins' *Marsden* motions, his *Faretta* waiver and his attempts to withdraw it, the court's invitation to Robbins to do what he could with the useless law library at the county jail, the pitiful sum allotted to the investigation of a first-degree murder case, or the court's failure to compel witnesses in Robbins' defense. Goodwin did not include any discussion of the apparent discrepancy regarding the victim's time of death, or the alleged *Brady* violations. He did not even mention the court's last-minute denial of the victim's rap sheet, the court's failure to hold a *pre voir dire* conference, the prosecutor's apparent attempt to secure an all-white jury, or the hearing on Robbins' *Marsden* motion at which the public defender strenuously argued the "overwhelming" evidence against his own client.

Goodwin thus neither drew attention to the facts that arguably supported Robbins' appeal, nor presented even the limited facts in his brief in a manner favorable to his client, nor addressed any of the non-frivolous issues that would have supported Robbins' appeal. He failed to raise any issues on his client's behalf, provided no citations to the record or to legal authorities that would have assisted the court in conducting its

own independent review of the record, and, in fact, cited no legal authorities whatsoever, except for off-handed references to *Marsden* and *People v. Wende*, 25 Cal.3d 436, 158 Cal.Rptr. 839 (1979), a California Supreme Court case that sets out the requirements of *Anders*.

Moreover, although Goodwin's entire "argument" consisted of a request that the court review the record for arguable issues, he failed to supplement the record on appeal to include precisely the portions of the record in which the arguable issues appeared. Thus, the record on appeal did not include transcripts of Robbins' third and fourth *Marsden* hearings, SER 13-25; ER 88-110; the transcript of the hearing on Robbins' first oral motion for advisory counsel, ER 46-50; Robbins' written motion for a continuance and for funds to retain a forensic expert and proceed with his investigation, SER 56-59; Robbins' motion for "advisory counsel, co-counsel or in the alternative counsel," SER 62; the transcript of the colloquy in which the court agreed to serve subpoenas for Robbins, ER 51-59; or the transcript of Robbins' oral motion for trial counsel, ER 60-73. Nor did the appellate record include any evidence relating to the prosecutor's *Brady*

violations, preventing the state court from reaching this issue.<sup>3</sup> This skeletal document certainly did not permit the state court of appeal to conduct a thorough review of the trial record. Robbins effectively had no counsel at trial and none on appeal.<sup>4</sup>

C. District Court Proceedings

After exhausting his state remedies, Robbins, acting in proper, filed a habeas petition in federal court. CR 1. After reviewing the briefs, the court appointed counsel to prepare a supplementary brief as to only one issue: whether the no-merit brief filed by Robbins' appellate counsel comported with *Anders v. California*, supra, and its progeny. CR 17, 21. After a hearing, the district court granted Robbins' habeas petition on the *Anders* issue alone and ordered the state to either grant

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3. Robbins requested new appellate counsel and, acting on his own behalf, sought to augment the record on appeal. Both of these requests were denied. CR 1, Ex. B-1, B-2. He also submitted a pro se brief on his own behalf. CR 25, Ex. 13.

4. Moreover, after Robbins filed his habeas petition, Goodwin voluntarily assisted the state in opposing it. On January 3, 1995, he executed a declaration that the state attached to its supplemental return before the district court, in which he stated that he "attempted to consider" "most" of the issues raised by his client, and "attempted to research" some of them. SER 442. In so doing, Goodwin breached his ethical duty. See *People v. Davis*, 48 Cal.2d 241, 309 P.2d 1 (1957). In any case, his declaration establishes that he did not represent Robbins zealously, or even competently.

Robbins a new trial or release him within thirty days. ER 111-20.

D. Ninth Circuit Proceedings

Both parties appealed the district court's ruling. The state contended that Robbins' appointed counsel had filed a constitutionally adequate brief on direct appeal, that Robbins' trial presented no non-frivolous issues, and that the application of *Anders* to Robbins' case violated *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989). Robbins cross-appealed, contending that the district court should have considered his claims of trial error as well as his claims of appellate error. The Ninth Circuit denied the state's appeal and granted Robbins' cross-appeal.<sup>5</sup>

It is important to underline the limited scope of the Ninth Circuit's decision. Contrary to the parade of horrors predicted in the state's petition before this Court, the Court of Appeals did not hold that California's no-merit procedure was inadequate. In fact, it endorsed California's procedure, citing extensively and with approval *People v. Wende*, supra, and *People v. Feggans*, 67 Cal.2d 444, 62 Cal.Rptr.2d 419 (1967), the two

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5. Robbins' cross-appeal is not at issue here.



California Supreme Court cases that first applied *Anders* to state court proceedings. See Petition for Writ of Certiorari ("Petition"), Appendix A, at 8868-69.

The Ninth Circuit's decision was straightforward and fact-specific. All that it held was that the skimpy brief filed in Robbins' behalf on direct appeal did not comply with either *Anders* or with the California cases:

Our obligation in this habeas action is to determine whether appellate counsel met his obligations under the United States Supreme Court's requirements set forth in *Anders* and its progeny. It is apparent that those requirements were not met.

Petition, Appendix A, at 8869.<sup>6</sup> Not surprisingly, given the age of *Anders* and the relative recency of Robbins' conviction, the appellate court also found that Robbins was not barred by *Teague v. Lane* from challenging under *Anders* the adequacy of his counsel's appellate brief. Petition, Appendix A, at 8872.

#### SUMMARY OF ARGUMENT

This Court issues writs of certiorari "only for compelling reasons." Supreme Court Rule 10. There is no compelling reason here, and the state does not even claim that any Rule 10

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6. In reaching this conclusion, the Court of Appeals determined that Robbins' trial presented at least two non-frivolous issues. Petition, Appendix A, at 8870-72. The state does not contest this portion of the appellate court's ruling.

consideration exists. The appellate court's decision is fact-driven and does nothing but apply long-standing precedent. It could not be less deserving of this Court's review.

The state's petition is premised on an immense misconception of the scope of the Ninth Circuit's decision. *Robbins v. Smith* does not overturn long-established California procedure. It does not make a single new rule of constitutional law. It simply holds that the no-merit brief filed in this case constituted a denial of due process under both *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967), and its California progeny. Because Robbins' conviction became final twenty-five years after *Anders* was decided, the decision below also holds that *Anders'* protections may be afforded Robbins without the bar presented by *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989). For a petitioner like Robbins, *Anders* could hardly be less of a "new rule" under *Teague*.

The state also argues that this Court should overturn its decision in *Penson v. Ohio*, 488 U.S. 75, 109 S. Ct. 346 (1988), and require habeas petitioners with *Anders* claims to show that they have been prejudiced by their attorneys' deficient briefs. As the Court recognized in *Penson*, however, to do so would be to eviscerate the protections of *Anders* and deprive petitioners of

the forceful appellate advocacy to which they are entitled, leaving only the cold record to speak in their behalf.

THERE IS NO REASON TO GRANT THE WRIT

A. The Petition Does Not Meet a Single Rule 10 Consideration

The state does not argue that this case meets a single one of the tests set forth in Supreme Court Rule 10, "considerations governing review on writ of certiorari." Nor could it: not a single one applies.

The first of these considerations, as outlined in the Rule, is whether a court of appeals has issued a decision that conflicts with the decision of another court of appeals. See *Yee v. City of Escondido*, 503 U.S. 519, 537-38, 112 S. Ct. 1522, 1534 (1992) (conflict between circuits "is, of course, a substantial reason for granting certiorari under this Court's Rule 10"). Here, there is clearly no such conflict.

The second consideration governing Supreme Court review is whether the appellate court has decided a federal question in a way that conflicts with the decision of a state court of last resort. That has not occurred in this case either. To the contrary: the Ninth Circuit's decision not only obeys *Anders*, but also cites approvingly both *Feggans, supra*, and *Wende, supra*. See Petition, Appendix A, at 8868-69.

The third consideration is whether the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Supreme Court Rule 10. That has not occurred here either. The appellate court's decision is an altogether straightforward application of long-standing Supreme Court precedent.

The other considerations governing review of certiorari likewise have no application to this case. The Court of Appeals here has not decided an important question of federal law that should be settled by this Court; rather, it applies a thirty-two-year-old decision of this Court to precisely the type of factual setting that this Court intended. Nor has the appellate court decided a federal question in a way that conflicts with relevant decisions of this Court. Quite the reverse: the appellate court's decision follows this Court's long-standing precedent.

In sum, there is no reason for this Court to grant the state's petition. The state does not even argue that this case meets any of the requirements set forth in this Court's Rule 10. Nor does this case present any other unusual or compelling features that require this Court's intervention.



B. The Appellate Court Decision Does Not Invalidate California Procedure

The state's petition paints an alarming picture: if the appellate court's decision is permitted to stand, the administration of justice in the nation's most populous state will grind to a halt. Petition at 5, 7-8.

This appalling prospect is an utter fabrication. It completely ignores the restricted scope of the Ninth Circuit's decision. *Robbins v. Smith* does not take a battering ram to state procedure. It does not unilaterally sweep away decades of established methodology. It does not break an inch of new ground. All it says is that Lee Robbins' state-appointed appellate counsel did a bad job.

The decision in this case first discusses counsel's obligations under *Anders*. It then painstakingly reiterates that these obligations have also been recognized by the California Supreme Court. Using an extensive quotation from *People v. Wende, supra*, which lays out the *Anders* requirements, the decision points out that, under state law, appointed appellate counsel bear the same responsibility to their clients as do counsel in federal proceedings under *Anders*. Petition, Appendix A, at 8868. The appellate court then asked "whether [Robbins'

counsel] met his obligations . . . under *Anders* and its progeny." Petition, Appendix A, at 8869. In a fact-specific analysis, the court concluded that Robbins' attorney had not "complied with *Anders* and *Feggans*." Petition, Appendix A, at 8869.

This is not new law. This decision poses no threat to California courts or to the administration of justice in California. What the appellate court has done is simply to apply *Anders* and its progeny, including its California progeny, to Robbins' specific factual situation. Lee Robbins' appointed counsel filed a constitutionally deficient appellate brief in his behalf. The appellate court, like the district court before it, has recognized that the brief was unacceptable. There is no reason for this Court to intervene.

C. *Penson v. Ohio* was Properly Decided

In *Penson v. Ohio*, 488 U.S. 75, 79, 85, 109 S. Ct. 346, 349, 352 (1988), this Court held that the failure to comply with *Anders* is presumed prejudicial. The state had premised its argument in *Penson* upon *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2092 (1984), contending that counsel's *Anders* violations were immaterial because the state appellate court had expressly found that the petitioner had suffered no prejudice from them. In an opinion written by Justice Stevens and joined

by six other justices, including Justice Scalia and Justice Kennedy (Justice O'Connor concurred separately), the Court flatly rejected the state's argument. The failure to provide even the constitutionally mandated minimum level of advocacy required by *Anders*, the Court held, amounts to the constructive denial of counsel, rather than ineffective assistance of counsel.

The state now asks this Court to overturn *Penson*, and to require habeas petitioners with *Anders* claims to show under *Strickland* that they have been prejudiced by their counsels' failures. As the Court pointed out in *Penson*, however, to do so would insulate counsel's failure to comply with *Anders* and would gut *Anders* altogether. *Penson*, 488 U.S. at 86, 109 S. Ct. at 353. As the Court stated, "The primary difficulty with the State's argument is that it proves too much." *Id.* Requiring a showing of prejudice would render *Anders* unenforceable as long as the state appellate court independently reviewed the record: the defendant would not be prejudiced whether the appellate court reversed the conviction or determined that the appeal was meritless. 488 U.S. at 86, 88-89, 109 S. Ct. at 353, 354.

The regime proposed by the state — and rejected by eight Justices of this Court in *Penson* — "would leave indigent criminal appellants without any of the protections afforded by *Anders*."

*Id.* Thus, although the state does not address the issue, the consequences of its argument are plain: to overturn *Penson* is to overturn *Anders*. Doing so would wipe away more than thirty years of this Court's constitutional jurisprudence and would deprive indigent appellants of the vigorous advocacy to which they are entitled.'

D. There is No Violation of *Teague v. Lane*

The state's misconstruction of the scope of the appellate court's decision drives its argument under *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989). Under *Teague*, a petitioner generally may not seek the retroactive application of a new rule of constitutional law in a federal habeas proceeding if that rule was developed after the petitioner's state conviction became final. 489 U.S. at 299-310, 109 S. Ct. at 1069-75. This doctrine accords respect to state sovereignty and underscores the limited role of habeas corpus as a check on that sovereignty. 489 U.S. at 305-10, 109 S. Ct. at 1073-75.

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7. In an effort to describe the review accorded to Robbins' direct appeal, the state introduces material outside the record. Its assertion that the California Appellate Project/Los Angeles reviewed this case was not presented (either as argument or as admissible evidence) to either of the federal courts below. Robbins accordingly moves to strike footnote 3 and the first full sentence on page 16 of the state's petition.



The state contends that applying *Anders* to Robbins' case now -- and thus, it contends, invalidating *Feggans* and *Wende* -- somehow turns *Anders* into a new rule for *Teague v. Lane* purposes. Even if the state's odd *Teague* theory were correct, it would have no application here. The Ninth Circuit has not invalidated either *Feggans* or *Wende*. In fact, as discussed above, it has endorsed California's jurisprudence, holding that Robbins' state appellate counsel did not comply with the requirements of either *Anders* or *Feggans*. Petition, Appendix A, at 8869.

Moreover, the state's *Teague* theory is not correct. Robbins' conviction became final on October 21, 1992, when his state petition for review of his conviction was denied. CR 7, Ex. 4. See *Allen v. Hardy*, 478 U.S. 255, 258 n.1, 106 S. Ct. 2878, 2880 n.1 (1986) (per curiam) (finality defined). *Anders* had been decided twenty-five years earlier, in 1967. Thus, for Robbins, as for any petitioner whose conviction became final after 1967, *Anders* is not a new rule. Nothing in *Teague* prevents a petitioner from basing a habeas petition on constitutional safeguards that were announced before his or her conviction became final. Indeed, after *Teague*, that is the only basis available for habeas relief.

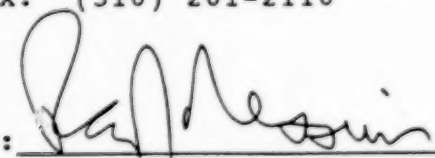
CONCLUSION

For the foregoing reasons, the state's petition for a writ of certiorari should be denied.

Dated: January 28, 1999

Respectfully submitted,

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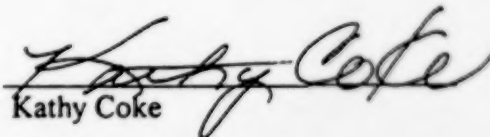
**CERTIFICATE OF SERVICE**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1875 Century Park East, 23rd Floor, Los Angeles, California 90067-2561.

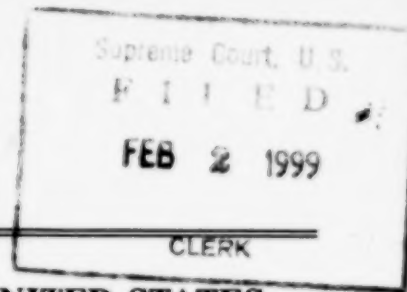
On January 28, 1999, I served the foregoing document described as **OPPOSITION TO PETITION FOR WRIT OF CERTIORARI** on the interested party in this action by placing a true copy thereof in sealed envelopes and arranging for mailing same to the parties listed below:

Carol Frederick Jorstad, Esq.  
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, that I am employed in an office of a member of the bar of this Court at whose direction this service was made, and that I executed this document on January 28, 1999, at Los Angeles, California.

  
Kathy Coke

(3)  
No. 98-1037



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**IN THE SUPREME COURT OF THE UNITED STATES**  
**OCTOBER TERM, 1998**

---

GEORGE SMITH, Warden, *Petitioner*,

v.

LEE ROBBINS, *Respondent*.

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ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

**REPLY TO OPPOSITION TO PETITION FOR WRIT OF  
CERTIORARI**

---

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## IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

No. 98-1037

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GEORGE SMITH, Warden, *Petitioner*,

v.

LEE ROBBINS, *Respondent*.

---

REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

Petitioner ("the Warden") respectfully submits this reply to the opposition, to the petition for writ of certiorari to correct errors, omissions and inaccuracies in the opposition.<sup>1</sup>

ARGUMENT**I.**

**Robbins is demonstrably wrong in arguing that *Robbins v. Smith* is fact-specific and does not affect California's no-merit brief procedure**

Respondent Robbins goes to great lengths in his opposition to deride the Warden's concern for the future of the California no-merit brief procedure. He declares that the "alarming picture" painted by the Warden "is an

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1. Preliminarily, counsel for the Warden acknowledges her own error in the certiorari petition. In referring to Robbins, who is respondent in this Court, counsel for the Warden erroneously labeled him "petitioner" in portions of the Argument section. Pet. 9, 12-14, 19, 22. The Warden is submitting a corrected copy of the Petition and respectfully requests that the Court file it. Counsel regrets her error and apologizes for any inconvenience or confusion her oversight has caused the Court.

utter fabrication." Opp. 19. He insists the decision is one of "limited scope," "straightforward and fact-specific." Opp. 14. According to the opposition, the Ninth Circuit did not find California's procedure inadequate. Opp. 14. Consequently, the decision "poses no threat to California courts or to the administration of justice in California." Opp. 20. The Ninth Circuit apparently disagrees.

In a decision not cited in the opposition, Judge Reinhardt, a member of the *Robbins* panel, took up the validity of California's no-merit procedure in a case filed after the effective date of the Antiterrorism and Effective Death Penalty Act (AEDPA). *Davis v. Kramer*, 1999 U.S. App. LEXIS 918, slip op. 3-4 (CA9 Jan. 26, 1999). *Robbins v. Smith*, 152 F.3d 1062 (CA9 1998), had been determined under the pre-AEDPA habeas corpus law. Except for the fact that *Davis* was post-AEDPA, Judge Reinhardt found *Robbins* and *Davis* to be "factually indistinguishable in all relevant respects." *Id.* at 5. That these briefs, the very similar is no coincidence. Both appellate attorneys were following the standard no-merit brief procedure, in accordance with California's long-settled, previously-unquestioned formula. *People v. Wende*, 25 Cal. 3d 436, 158 Cal. Rptr. 839 (Cal. 1979).

Not surprisingly, the panel struck down the brief filed in *Davis*, just as the *Robbins* panel had earlier done. *Davis*, slip op. 3. It was required to do so, because only the court sitting en banc can reconsider a rule of law embodied in a prior published opinion. *United States v. Gay*, 967 F.2d 322, 327 (CA9 1992); *Antonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1479 (CA9 1987). Once the Ninth Circuit denied the Warden's suggestion for rehearing en banc, it was predictable that *Robbins* would metastasize.

The Ninth Circuit has struck down two similar California no-merit briefs as insufficient under *Anders v. California*, 386 U.S. 738 (1967), even though both briefs were filed in compliance with *People v. Wende*, the state-

law interpretation of *Anders*. *Davis* is irrefutable proof of the Ninth Circuit's apparent determination to obliterate *Wende*, even if it has to do it a brief at a time.

Where does that leave the California courts? In chaos. State courts are not bound in a *stare decisis* sense by the decisions of the federal courts of appeals. *People v. Bradley*, 1 Cal. 3d 80, 86, 81 Cal. Rptr. 457 (Cal. 1969); see also *Lockhart v. Fretwell*, 506 U.S. 364, 375-76 (1993) (conc. op. of Thomas, J.). They are bound only by the decisions of this Court and of the state supreme court. *Id.* In fact, as this Court only recently reminded the Ninth Circuit,

state courts . . . possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law.

*Arizonans for Official English v. Arizona et al.*, 520 U.S. 43, 117 S. Ct. 1055, 1064 n.11 (1997).

In California, that means the intermediate appellate courts are obliged to follow *Wende*, unless and until either this Court or the state supreme court strikes it down. At the same time, all federal courts in the Ninth Circuit are bound to follow *Robbins* and now *Davis*.<sup>2</sup> *Gay*, 967 F.2d at 327.

As a practical matter, California's appointed appellate counsel are faced with an insoluble dilemma. In no-merit cases -- more than 20 percent of all criminal cases on appeal -- state law directs them to adhere to a procedure on direct appeal for which they will predictably be found, one by one, to have provided ineffective assistance when their work is reviewed on federal habeas corpus.

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2. Warden Kramer intends to file a petition for writ of certiorari in the *Davis* case.



The confusion is effectively limned in the amicus brief filed by the California Academy of Appellate Lawyers. Members of the Academy accept appointments from the state appellate courts to represent indigent appellants, serve on the state's Appellate Indigent Defense Oversight Advisory Committee, and administer the state's appellate projects. Amicus 1. Amicus has joined the Warden in his effort to retain the *Wende* procedure, not because defense counsel have suddenly become insensitive to the rights of their clients, but because they are persuaded that they can represent their indigent clients most ethically and effectively under the *Wende* system. Amicus 8, 11-12.

In his opposition, respondent insists that there is nothing new in *Robbins*, because "[a]ll it held was that the skimpy brief filed in Robbins' behalf on direct appeal did not comply with either *Anders* or with the California cases[.]" Opp. 14. The Ninth Circuit's decision in *Davis* belies that claim. Robbins's assertion is also rebutted by the amicus brief, in which the Academy flatly declares that the decision of the Ninth Circuit Court of Appeals in this case would invalidate the existing procedure for "no-merit" appeals in California cases involving indigent defendants. . . .

Amicus 2.

The Ninth Circuit did not even wait to decide *Davis* until this Court had resolved the certiorari petition in *Robbins*. For all of these reasons, as petitioner has previously urged, a grant of certiorari is urgently needed.

## II.

**Robbins's attempts to obscure the issue in this case should not be permitted to succeed**

In an apparent attempt to obfuscate what is, after all, a very simple legal point, Robbins lays out page

after page of factual material, most of which is wholly irrelevant to the issue before this Court. Opp. 1-8. The Court need not make its way through this smokescreen to rule on the propriety of California's no-merit brief procedure. The Warden will focus his reply on the waiver of counsel at trial and the effectiveness of counsel on appeal.<sup>3</sup>

### A. The waiver of counsel at trial

Robbins insisted on representing himself at trial, as he had a right to do. *Faretta v. California*, 422 U.S. 806 (1975). He now provides this Court with an account of his miscues and defaults at trial, pleading for relief from his own incompetence. Opp. 2-8.

At trial, Robbins, an indigent, tried to force the court to remove the public defender and appoint counsel of his choice. Alternatively, Robbins wanted advisory counsel. During the protracted pretrial period, Robbins received *eight* hearings before *four* different judges relating to his requests for other representation, advisory representation and, ultimately, self-representation. ER 4 at 74-87; ER 5 at 88-110; ER 1 at 1-19; ER 3 at 46-50; ER 2 at 37-45; ER 3 at 51-59; ER 3 at 60-73. Each judge exercised his discretion to refuse the first two options. *Id.* When Robbins was unsuccessful in manipulating the court, he demanded to represent himself. He was undeterred by the exhaustive admonitions of the court and the deputy district attorney. ER 1 at 6-15. At that point, Robbins had been certified competent for trial, and the court, finding he had knowingly and intelligently waived counsel,

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3. Robbins disingenuously suggests that the Warden does not contest the Ninth Circuit's ruling that there were at least two non-frivolous issues to be raised. Opp. at 15 n.6. As Robbins is aware, the Warden has vigorously challenged that assertion at every stage of this litigation. The Warden did not mention it in the petition for certiorari, because it was not relevant to the questions presented.

had no real choice but to accede to his demand. ER 1 at 9-12. Eight days before the trial, after Robbins had delayed for months, he told the trial court:

... I would like to have the assistance of counsel at the trial. I am not real good at public speaking. I am doing okay as far as the law work and stuff. Obviously, I am not a lawyer, but I need somebody to help me present the case.

ER 3, pp. 60, 69. Interpreting Robbins's statement as a request for counsel, the trial court offered to reappoint the public defender. Robbins declined the offer and went to trial as his own attorney. Small wonder, the chickens came home to roost.

As Robbins now acknowledges, he failed to voir dire jurors, introduce exculpatory evidence, impeach prosecution witnesses, overcome the prosecutor's objections, and argue the presumption of innocence or the burden of proof -- and that was only the beginning. Opp. 3-7. Most significantly, Robbins failed to preserve any issues for direct appeal.

In *Faretta* itself, Justice Blackmun, writing in dissent, warned:

If there is any truth to the old proverb that "one who is his own lawyer has a fool for a client," the Court by its opinion today now bestows a constitutional right on one to make a fool of himself.

*Id.* at 852. Having represented himself at trial, Robbins cannot complain of ineffective assistance on appeal. *Faretta*, 422 U.S. at 846 n.46.

Robbins's assertion that the case was close is absurd. As he himself acknowledges, the jury found him guilty of second degree murder after "several hours." Opp. 7. This was not a close case.

## **B. Appellate counsel's effectiveness**

Respondent recites at length the alleged defaults of his appellate attorney. He avers that the record was "replete with non-frivolous issues." Opp. 9. He charges counsel not only with failing to file a merits brief, but also with filing a deficient no-merit brief. *Id.* His claims are spurious.

### **1. The decision to file a no-merit brief**

California courts have rejected the notion of an "arguable-but-unmeritorious" issue on appeal. *People v. Johnson*, 123 Cal. App. 3d 106, 109, 176 Cal. Rptr. 390 (1981). An arguable issue is one which is meritorious, that is, one which has a reasonable potential for success. *Id.* In addition, the issue must, if resolved favorably to the defendant, result in a reversal or a modification. *Id.*; accord, *People v. Placencia*, 9 Cal. App. 4th 422, 425, 11 Cal. Rptr. 2d 727 (1992). The Ninth Circuit has not grasped this point. Indeed, this is the heart of California's dispute with the Ninth Circuit. For the Ninth Circuit, it appears, there simply cannot be a meritless appeal. The Ninth Circuit is wrong. This is one.

Robbins's counsel on appeal cannot be faulted for filing a no-merit brief when Robbins did not preserve any appellate issues at trial. Under California law, matters outside the trial record will not be considered on direct appeal. Cal. R. Ct. 4, 5; *In re Kathy P.*, 25 Cal. 3d 91, 102, 157 Cal. Rptr. 874 (1979). Through his own inexperience, Robbins simply did not provide appellate counsel with a record which would have permitted a merits appeal. The lower federal courts suggested two issues were potentially meritorious: the adequacy of the law library and the counsel issue. Those claims are fully refuted by the record. The sole mention of the law library was in the trial court's *Faretta* warnings to Robbins. ER 2 at 37-41. There was no evidence from Robbins or any



other source in the record to support such a claim on appeal. ER 3 at 60, 69.

As to the issues relating to counsel, space does not permit a full exposition of what transpired in the eight hearings that Robbins was given. However, the record unequivocally shows that Robbins's federal constitutional rights were scrupulously honored. His real complaint is that he asked to represent himself, was allowed to do so, and is now suffering the consequences. That claim is not cognizable on appeal in any court.

Appellate counsel for Robbins was thorough, competent and experienced, but not a magician. He knew that there were no non-frivolous issues to be raised, because there was no record or no legal support or both.

## 2. The adequacy of the no-merit brief

As more fully detailed in the amicus brief, the brief of counsel on appeal was fully compliant with *People v. Wende*, the state-court interpretation of *Anders v. California*. Contrary to respondent's assertion, counsel cited to the record throughout his brief. Pet. App. G.

In invalidating the brief this case, the Ninth Circuit necessarily discredited the entire state procedure. The opinion in *Davis v. Kramer* resolves any lingering doubt on that score. Counsel was competent. He knew and understood state procedures and state law. The only significant issue presented by this case is whether *Wende* is a valid interpretation of *Anders*.

Robbins accuses appellate counsel of being unethical for providing a declaration to the state on federal habeas corpus. Opp. 13 n.4. Robbins waived the privilege when he alleged incompetence. Counsel was entitled under both state and federal law to defend himself. *Wharton v. Calderon*, 127 F.3d 1201, 1203 (CA9 1997); *In re Gray*, 123 Cal. App. 3d 614, 616, 176 Cal. Rptr. 721 (Cal. 1981).

## III.

**California's *Wende* procedure is protected from a habeas court's retroactive invalidation by *Teague v. Lane***

Finally, respondent suggests that the Warden's "misconstruction of the scope of the appellate decision drives its argument under *Teague v. Lane*[" Opp. 22. However, as the Warden has previously argued, unless the federal courts have exclusive jurisdiction, the state courts have the authority to interpret federal law and render binding decisions on it. *Arizonans for Official English v. Arizona et al.*, 117 S. Ct. at 1064 n.11. It has never been suggested that the federal courts have exclusive authority to interpret the law relating to the filing of no-merit appellate briefs. On the contrary, the nationwide legal history dispositively demonstrates that states have authority to interpret this Court's case law in ways that are practicable. As Justice Brandeis said:

It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment . . . . But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles.

*New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J. diss.). This case is all about the Ninth Circuit retroactively fettering the state courts' handling of no-merit indigents' briefs. As is apparent from the amicus brief, the California bench and bar have relied on *Wende* as a valid explication of *Anders* for the last 20 years. *Teague v. Lane* proscribes the undermining of California's

reasonable, good-faith interpretation at this late date on federal habeas corpus.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: February 1, 1999.

Respectfully submitted,

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No. 98-1037

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

GEORGE SMITH, Warden, Petitioner,  
v.  
LEE ROBBINS, Respondent.

PROOF OF SERVICE UNDER RULE 29.5(c)

I, GIL CARREON, declare as follows:

I am over 18 years of age, and not a party to the within cause, my business address is 300 S. Spring Street, Los Angeles, California 90013;

I served **three (3) copies** of the REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI in the above entitled case on each of the following persons:

Ronald J. Nessim, Esq.  
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by placing same in an envelope(s) addressed to the post office address of each said person(s), and by sealing and then depositing each said envelope, on FEB 0 2 1999, in the United States mail at Los Angeles, California, with first-class postage thereon fully prepaid;

I thereby certify that I am employed in the office of member of the Bar of this Court at whose direction the service was made;

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on FEB 0 2 1999, at Los Angeles, California.



2

No. 98-1037

Supreme Court, U.S.  
**F I L E D**

**JAN 29 1999**

CLERK

In The  
**Supreme Court of the United States**

October Term, 1998

GEORGE SMITH, Warden,

*Petitioner,*

v.

LEE ROBBINS,

*Respondent.*

On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit

**BRIEF OF AMICUS CURIAE IN SUPPORT OF  
PETITION FOR WRIT OF CERTIORARI**

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### INTEREST OF AMICUS CURIAE

The California Academy of Appellate Lawyers is an organization of over 100 appellate practitioners from throughout the state of California which concerns itself with issues in the appellate process.<sup>1</sup>

Academy members are among those accepting appointments from the California state appellate courts to represent indigent clients in appeals from criminal convictions, are members of the state's Appellate Indigent Defense Oversight Advisory Committee which reports to the Chief Justice of the California Supreme Court, and are employed in the administration of California's appellate "projects." These five offices are nonprofit organizations which contract with the state Administrative Office of the Courts to administer the panel of attorneys who accept appointments in non-capital indigent criminal appeals in each of the six California Court of Appeal districts. Among other duties, each "project" (1) develops and maintains a panel of private attorneys who wish to accept indigent criminal appointments in the district, (2) matches attorneys to appellate cases based on the perceived difficulty of the case and the experience and skills of counsel, and (3) reviews and evaluates the work of counsel to provide quality control and to inform future appointments.

---

<sup>1</sup> In conformity with Rule 37.6, the California Academy of Appellate Lawyers informs the Court that no counsel for any party to this matter authored the brief in whole or in part, and that no person or entity other than the Academy made a monetary contribution to the preparation or submission of the brief.

Inasmuch as the decision of the Ninth Circuit Court of Appeals in this case would invalidate the existing procedure for "no-merit" appeals in California cases involving indigent defendants, the Academy and its members are immediately affected by it and concerned about the impact it will have on the California appellate system.

The parties to this matter have consented to the filing of this amicus brief as provided in Rule of Court 37(a).

---

#### SUMMARY OF ARGUMENT

California's procedure in no-merit appeals is part of an integrated approach to the provision of representation to indigent appellants in criminal cases which allows the California courts to achieve the goals set by this court in *Anders v. California*, 386 U.S. 738 (1967) with a high degree of efficiency and effectiveness. California has accomplished this result by supplementing the full *judicial* review of the record required in no-merit cases by *Anders* with an additional layer of record review through the system of "appellate projects" which provide monitoring, assistance and support for the appointed criminal appellate bar in this state. California thus provides heightened record review while relieving appellate counsel of the need to condemn no-merit appeals as frivolous, providing continuity of counsel in no-merit cases, and lightening the burden of the appellate courts in no-merit cases. California's procedure should be preserved; and the decision of the Ninth Circuit Court of Appeals which condemns it must therefore be reversed. Accordingly, the

writ of certiorari for which petitioner prays should be issued.

---

#### ARGUMENT

#### CALIFORNIA'S PROCEDURE FOR HANDLING NO-MERIT APPEALS IN NON-CAPITAL, CRIMINAL CASES MEETS THE REQUIREMENTS OF THIS COURT'S *ANDERS* DECISION EFFECTIVELY AND EFFICIENTLY.

This Court held in *Anders v. California*, *supra*, 386 U.S. 738, that, where appointed counsel finds there are no issues in the appeal of an indigent defendant, the Sixth Amendment requires the appellate court to conduct an independent review of the record, and to afford the defendant counsel to present any issue the court has found arguable. In its implementation of *Anders*, the California Supreme Court has developed a procedure which has greatly enhanced the Sixth Amendment protections afforded to indigent appellants in non-capital, "no-merit" appeals.

Under this procedure, counsel who are unable to find any arguable issues in the record are required to prepare a brief setting forth the facts and procedural history of the case and requesting that the court conduct an independent review of the record. *People v. Feggans*, 67 Cal.2d 444, 447-448, 62 Cal.Rptr.2d 444 (Cal. 1967); *People v. Wende*, 25 Cal.3d 436, 158 Cal.Rptr. 839 (Cal. 1979); *In re Sade C.*, 13 Cal.4th 952, 55 Cal.Rptr. 771 (Cal. 1996). The court then conducts such a review, and if it finds that an arguable issue exists, instructs counsel to brief that issue

for the court. Alternatively, new counsel may be appointed for this purpose. *Wende*, 25 Cal.3d, at p. 442.

*Wende* expressly prohibits counsel from arguing against their clients, *Id.*, 25 Cal.3d, at 440, and states that an attorney who declares the appeal to be frivolous is disqualified and must request withdrawal. However, it also allows counsel to avoid disqualification by simply presenting the case to the court without argument and without declaring the appeal to be frivolous, thereby making continuity of representation possible in case the appellate court does find arguable issues. *Id.*, at p. 442.

Consistent with that approach, *Wende* does not require appointed counsel to list the issues which counsel considered and rejected, or to cite authorities supporting counsel's decision not to brief those issues. *Ibid.* It is these aspects of the *Wende* procedure the Ninth Circuit found objectionable. *Robbins v. Smith*, 152 F.3d 1062, 1067 (CA9 1998).

The Ninth Circuit critique ignores an important part of the process California has developed to protect the rights of indigent defendants in the 32 years since *Anders*: the system of appellate projects which administers indigent criminal appeals in California.

In the course of those three decades, the state's Administrative Office of the Courts has contracted with five appellate projects (nonprofit organizations with independent directors) to administer indigent criminal appeals arising in each of California's appellate districts. The projects, staffed by attorneys who specialize in criminal appeals, arrange for the appointment of counsel with skills and experience appropriate to the complexity of the

particular case and then monitor counsel's representation as the case progresses.

Appointed counsel are prohibited from filing no-merit briefs without first consulting with the projects, and, as a matter of standard practice, a project staff attorney reviews the entire record first before a *Wende* brief is filed. The project attorney's review searches not just for clearly reversible errors but, as defense advocates, for any "arguable" issues. Thus, this process provides a significant additional level of protection in assuring competent representation in non-capital, indigent criminal appeals.

Petitioner has ably made the legal arguments in support of the issuance of the petition. Accordingly, amicus will not reargue the legal issues discussed by petitioner, but will instead attempt to assist the court by providing additional information regarding California's system of appellate projects, the procedures employed in California no-merit appeals, and the manner in which this state has balanced the needs of the courts, the constitutional interests of indigent appellants, and the duties of loyalty and confidentiality which counsel owe to their clients.

### 1. The California appellate project system.

In 1967, when *Anders* and *Feggans* were decided, indigent criminal appeals in California were administered directly by the California Courts of Appeal. The courts themselves appointed private counsel, decided the appeals, and compensated counsel for their services. In no-merit appeals prior to *Anders* and *Feggans*, counsel



submitted a no-merit letter and the case was concluded. After these two cases were decided, counsel was required to prepare a brief to assist the court, and the court conducted its own independent review of the record to ensure no arguable issues had been missed. *Wende*, 25 Cal.3d, at p. 440.

In 1985 the California Judicial Council adopted California Rule of Court 76.5, which authorized the Courts of Appeal to "contract with an administrator having substantial experience in handling criminal appeals" to handle the administrative functions formerly performed by the courts themselves. *See also*, Standards of Judicial Administration, Std. 20. Within a few years, appellate projects were established to administer indigent appeals in all six California appellate court districts.

All non-capital indigent criminal appeals in California are now administered through the appellate project system, as are most appeals in civil juvenile delinquency and dependency proceedings. The projects currently administer a caseload of approximately 10,000 appeals each year. This represents more than half of all the appeals – civil and criminal – filed in all appellate districts in the state of California. *Court Statistics Report*, Judicial Council of California, vol. 1, p. 24 (1998). The projects perform a large number of administrative and training services and also provide direct representation in some cases.

Every notice of appeal filed by a defendant who has been convicted of a criminal offense is referred by the respective Court of Appeal to the appropriate appellate project. The project then conducts an initial review of the

case and matches the case with an attorney whose skill and experience are appropriate to the particular case.

This "matching" function is one of the most critical services which the projects provide. The projects maintain individual panels of attorneys who are ranked in categories ranging from Level 1, comprising those attorneys who are essentially beginners, to Level 5, comprising the most skilled and experienced attorneys. The projects share information regarding their respective panels, and each panel attorney's work product is evaluated in every case to determine whether the attorney's current ranking is appropriate.

Upon receiving the notice of appeal in a case, the projects evaluate the case and categorize it according to a variety of factors, including the nature of the charges of which the appellant was convicted, the length of the sentence imposed, whether the case was tried to the court or a jury, the length of the record, and a number of other considerations. The project then contacts an attorney in the appropriate skill category and assigns the case to him or her.

The projects assign cases on either an "independent" or an "assisted" basis. In an "independent" case, the panel attorney provides all legal services required by the case, but also sends a copy of each document which has been filed with the court to the assigning project. The staff attorney reviews these documents in order to prepare an evaluation of the attorney's work and to evaluate the attorney's claim for compensation. In addition, panel attorneys in independent cases are encouraged to consult



with the project staff attorney assigned to the case on difficult legal or ethical issues which may arise.

Only relatively skilled and experienced attorneys are assigned cases on an "independent" basis, roughly 60% of the cases. The remaining 40% of the cases are assigned to relatively less experienced attorneys on an "assisted" basis. In an "assisted" case, an experienced project staff attorney conducts an extensive initial review of the record and prepares a memorandum to the panel attorney on issues the project attorney has identified. The panel attorney then separately reviews the record, and prepares a draft of the opening brief. The opening brief is then reviewed by the project attorney prior to filing. The project attorney also reviews other documents, such as reply briefs and petitions for review, and may attend oral argument in order to monitor the attorney's performance.

The development of the project system has greatly professionalized criminal appellate practice in California. In addition to the individual case instruction, the projects also provide resource materials and regular training, or continuing legal education, sessions for panel members on both substantive and procedural topics.

The courts maintain ongoing supervision of the appellate project system through the California Judicial Council and the Administrative Office of the Courts, the administrative arm of the California judicial branch. In addition, the chief justice of the California Supreme Court has created a 10-member Appellate Indigent Defense Oversight Advisory Committee, comprised of six appellate court justices, two appellate project directors, and two appellate practitioners, to monitor the work of the

projects. This committee meets on a quarterly basis and performs a detailed audit of randomly selected, recently closed cases within the appellate project system; this audit is addressed to both the quality of work and hours billed by appointed counsel and to the administrative oversight provided by the projects. Based on its review of California's non-capital, appointed appellate counsel system, the committee reports its recommendations regarding potential changes in the system to the Chief Justice of California and the Administrative Presiding Justices of the California Courts of Appeal.

## **2. California's procedure in no-merit appeals.**

The degree of project supervision in *Wende* cases depends upon whether the case has been assigned on an "independent" or an "assisted" basis.

In an "independent" case, the attorney may not file a *Wende* brief without first consulting the project staff attorney and receiving permission to file a no-merit brief. As a matter of standard practice, either the panel attorney will request that the project attorney review the entire record or selected portions of it or the project attorney will ask to review the record, thus providing a second opinion regarding issues the panel attorney has considered and rejected.

In an "assisted" case, the project's review is much more involved. Not only must the panel attorney consult with the project attorney before filing a no-merit brief, the project staff attorney will also normally conduct a complete review of the record to ensure that the panel attorney has not missed any arguable issues. Only then

may the attorney file a brief requesting that the court review the record to determine whether there are any arguable issues.

The California appellate project system provides at least as much, and perhaps more, protection of the Sixth Amendment interests of indigent criminal appellants as this court contemplated at the time of *Anders*. The system first provides "front-end" insurance that the attorney appointed to represent an indigent appellant has the appropriate qualifications, training, and skills to provide legal services in each case. The system also provides additional "back-end" protections. If a complete review of the record and the relevant authorities convinces the panel attorney that a no-merit brief is appropriate, his or her decision is again reviewed by the appellate project staff attorney before any such brief is filed. Only then is the case finally presented to the Court of Appeal, which conducts its own independent review of the record to determine whether the panel attorney and the project attorney have missed any arguable issues.

In reality, the California system provides the indigent appellant with not merely one review of the appellate record by a competent attorney but two plus, pursuant to *Anders*, an additional review of the record performed by the Court of Appeal. Appointed counsel's decision is second-guessed by the appellate project staff attorney, and their judgment is then "third-guessed" by the court itself.

The California courts have concluded that the requirements of *Wende*, when coupled with the project review process, results both in thorough record review

and protection of indigent appellants' Sixth Amendment rights. *Sade C.*, 13 Cal.4th at pp. 980-981, 990-991. This point was made explicit in three recent decisions of the California Court of Appeal:

Pursuant to rule 76.5, and with funding from the Legislature, the Judicial Council provided each Court of Appeal with an appellate project administrator and experienced staff to administer the court-appointed counsel program for each court. (It bears noting that this has been done at a not-inconsiderable cost to the taxpayers. In fiscal 1993-1994, for example, the cost for the appellate project statewide was approximately \$11 million or nearly one-third of the total outlay for court-appointed counsel in the Courts of Appeal.)

The agency which operates in this District is the First District Appellate Project (FDAP). We are confident that FDAP employs both able and experienced lawyers in criminal law to assist and, where appropriate, supervise appointed counsel. FDAP and, as we understand it, the other appellate project administrators, are under contract to the court; their contractual duties include review of the records to assist court-appointed counsel in identifying issues to brief. If the court-appointed counsel can find no meritorious issue to raise and decides to file a *Wende* brief, an appellate project staff attorney reviews the record again to determine whether a *Wende* brief is appropriate. Thus, by the time the *Wende* brief is filed in the Court of Appeal, the record in the case has been reviewed both by the court-appointed counsel (who is presumably well qualified to handle the case) and by an experienced attorney on the staff of FDAP. In our view,



this double review provides more than sufficient assurance that the record in each respective appeal has been carefully examined for error and, therefore, that a conclusion by counsel that the appeal is without merit is one upon which this court can and should rely.

(*People v. Hackett* (1995) 36 Cal.App.4th 1297, 1311-1312.)

... when we receive a *Wende* brief from one of these [attorneys appointed through the project process], we are assured that in fact the record has been sifted, potential issues for review have been analyzed, and the conclusion reached that there are no issues for review is professionally sustainable. Beyond this, we know that before a *Wende* brief is submitted it, as well as the record on which it is based, have been reviewed by an experienced [project attorney].

(*In re Angelica V.* (1995) 39 Cal.App.4th 1007, 1015.)

Finally, the California Court of Appeal, Second Appellate District (the court in which the instant case arose) has voiced similar confidence in the projects' *Wende* review procedures. In a 1995 case, Division Three of that court, in an opinion by Associate Justice Walter Croskey, noted that the California Appellate Project office which operates in Los Angeles "employs some of the state's most able and experienced lawyers in criminal and juvenile law to assist and, where appropriate, supervise appointed counsel." It is these lawyers who review the

record before a *Wende* brief is submitted. (*In re Sade C.*, 38 Cal.Rptr.2d 822, 835, fn. 16.<sup>2</sup>)

**3. A number of other considerations militate in favor of retaining California's present procedure in no-merit appeals.**

A number of other considerations support the retention of the existing California procedure.

The *Wende* court recognized that there are sound practical reasons for seeking to preserve continuity of counsel in no-merit as in other cases, *Ibid.*; see, also, *Suggs v. United States* (D.C. Cir. 1968), 391 F.2d 971, 977-978; ABA Project on Standards for Crim. Justice, Stds. Relating to Crim. Appeals (Approved Draft 1970) std. 3.2 and made it possible to do so.

If counsel has disabled himself from continuing on a case and the court discovers an arguable issue which counsel missed, new counsel must be appointed to brief the issue. To do so, this successor attorney must review the same appellate record which the original attorney has already reviewed, and appellate records often run into the thousands of pages and require many hours to review. Successor counsel must also establish a working relationship with the client. All of these services are both

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<sup>2</sup> The Court of Appeal version of *Sade C.* was superseded by a grant of review and subsequent decision of the California Supreme Court. Under California Rule of Court 976, the case may not be cited as authority. Reference to the footnote discussed in the text is included here for reasons unrelated to the holding of the case.



time-consuming and costly, since the court must ultimately compensate both attorneys.

The California procedure avoids other ethical complications as well. For example, when an appointed attorney concludes there are no arguable issues on appeal and submits the case to the Court of Appeal, the court is then placed in the awkward position of reviewing a record to locate legal issues which it must then eventually decide. Indeed, this problem was raised in the dissent of California Supreme Court Justice William Clark when *Wende* itself was decided.

The majority now require an appellate court to abandon its traditional role as an adjudicatory body and to enter the appellate arena as an advocate. Whatever the right of a person convicted of crime to an appeal, an appellate court cannot be burdened first, with determining what contentions should be urged on appeal and then, with resolving those contentions.

(*People v. Wende*, 25 Cal.3d at pp. 443-444,[conc. and dis. opn. of Clark, J.]; see, also, *People v. Hackett*, *supra*, 36 Cal.App.4th 1297, 1302.)

The secondary record review performed by California's appellate projects helps to insulate the courts from being placed in this difficult position. The appellate project staff attorney who performs the second review of the record shares the ethical obligations to the client which apply to the appointed attorney himself.

The importance of this consideration should not be underestimated. An attorney is sometimes obliged not to raise an issue which might otherwise appear to be arguable or even meritorious due to information outside the

record on appeal or instructions he has received from his client. Appointed counsel can share this information with project staff counsel without breaching his duty to the client, and staff counsel can consider that information in reviewing the appointed attorney's decision. Of course, neither attorney could ever share such information with the court itself without violating the duty of confidentiality.

In addition, the projects' ethical duties to the client place them in a better position than the courts themselves to acquire a complete grasp of the appellant's case. Not only may the projects communicate with appointed appellate counsel, they may also communicate with trial counsel to obtain information which does not appear on the face of the record itself but which may affect the decision to raise or not raise particular issues. The courts are not in this position. Indeed, trial counsel's duty to protect his client's interests prohibit him from communicating with the court on such issues. Accordingly, the projects provide an additional safeguard of the Sixth Amendment interests of indigent appellants.

---

## CONCLUSION

California's procedure in non-capital, no-merit cases achieves the paramount goal of protecting the Sixth Amendment interests of indigent criminal appellants to competent counsel while also resolving the ethical dilemmas with which no-merit appeals confront appointed counsel, providing for continuity of representation in

such cases, and lightening the burdens they impose on the appellate courts.

Amicus respectfully submits that this court should issue the writ of certiorari petitioner has requested in order to address the important constitutional issues which this case presents.

Dated: January 28, 1999

Respectfully submitted,

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APR 22 1999

No. 98-1037

CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1998

GEORGE SMITH, Warden,

*Petitioner,*

vs.

LEE ROBBINS,

*Respondent.*

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**JOINT APPENDIX**

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Proceedings include all events.      TERMED  
2:94cv1157      APPEAL  
Lee Robbins v. George Smith, et al.

U.S. District Court  
Central District of California (Western Div.)

CIVIL DOCKET FOR CASE #: 94-CV-1157

Lee Robbins v. George Smith, et al.  
Filed: 02/24/94  
Assigned to: Judge George H. King  
Demand: \$0,000      Nature of Suit: 530  
Lead Docket: None      Jurisdiction: Federal  
Question  
Dkt# in other court: None

Cause: 28:2254 Petition for Writ of Habeas Corpus  
(State)

- 2/24/94 1 PETITION FOR WRIT OF HABEAS  
CORPUS by Petitioner Lee NMI Robbins  
in State custody w/affdt in f/p. Mld cpy to  
A/G State of CA., 300 S. Spring St., Suite  
500 N Tower, LA CA 90013 (ca) [Entry  
date 02/25/94]
- 2/24/94 2 NOTICE and ORDER of Reference to  
Magistrate Judge George H. King (ca)  
[Entry date 02/25/94]
- 2/24/94 -- CASE REFERRED to Magistrate Judge  
George H. King (ca) [Entry date 02/25/94]



- 3/2/94 3 ORDER Tht the attorney general of the state of Ca fl a return to the petn on/or bef 3/23/94, on the issue of exhaustion; if exhaustion is conceded, then on the merits. Respondents' return, if addressed to the merits, shall be accompanied by all state records, & address the merits of each claim raised in the Pet. Respondents shall srv a copy of the return upon petnr prior to the flng thereof. by Magistrate Judge George H. King (bp) [Entry date 03/07/94]
- 3/7/94 4 ORDER RE TRANSFER PUR TO G.O. 224 (Related case to CV90-5013 AWT (GHK) by Judge William J. Rea Case reassigned to Judge A. W. Tashima for all further proceedings (cc: all counsel) (es) [Entry date 03/08/94]
- 3/21/94 5 EX PARTE APPLICATION by respondent George NMI Smith, respondent AGCA to extend ti to fl a return decl of Carol Frederick Jorstad; motion hearing set for <date not set> (bp) [Entry date 03/22/94]
- 3/21/94 -- LODGED/PROPOSED ORDER (bp) [Entry date 03/22/94]
- 3/24/94 6 ORDER by Magistrate Judge George H. King granting motion to extend ti to fl a return [5-1] Respondent is given until 5/13/94 to fl a traverse. (bp) [Entry date 03/25/94]

- 4/12/94 8 EX PARTE APPLICATION to file memo of p/a in excess of 35 pages by respondent George NMI Smith, respondent AGCA (jw) [Entry date 04/18/94]

Docket as of January 16, 1996 11:08 am

Proceedings include all events.      TERMED  
2:94cv1157                              APPEAL  
Lee Robbins v. George Smith, et al.

- 4/12/94 -- LODGED/PROPOSED Order (FWD TO CRD) (jw) [Entry date 04/18/94]
- 4/13/94 10 ORDER that Crt hereby grants resps lv to file a memo of P/A in excess of 35 pages suppt of the Return to the Pet for Writ of H/C Magistrate Judge George H. King. (suz) [Entry date 04/20/94]
- 4/15/94 7 RETURN TO PETITION for Writ of H/C; memo of P/A; decl and exhibits in suppt by respondent George NMI Smith, respondent AGCA [1-1] (suz) [Entry date 04/19/94]
- 5/11/94 11 NOTICE OF MOTION AND MOTION by petitioner Lee NMI Robbins for enlargement of ti to fl a traverse to the return; motion set for <date not set> (bp) [Entry date 05/13/94]
- 5/11/94 9 LODGED/PROPOSED Order re mtn for enlargement of ti (FWD TO CRD) (we) [Entry date 01/16/96] [Edit date 01/16/96]
- 5/16/94 12 MINUTES: granting motion for enlargement of ti [11-1] This matter is deemed submitted. Petr's mot is GRANTED. Pet shall have to & including 6/2/94, within which to fl his traverse. Failure to timely fl the traverse shall be deemed petr's consent to dismissal of this actn for failure to

prosecute. by Magistrate Judge George H. King CR: none (bp) [Entry date 05/18/94]

- 5/16/94 13 NOTICE OF MOTION AND MOTION by petitioner Lee NMI Robbins to enlarge ti to fl a traverse to the return; motion hearing set for <date not set> (bp) [Entry date 05/18/94]
- 5/27/94 14 TRAVERSE to return to petn for writ of H/C; memo of p's & a's in support: decl & exhibits in support of pet. by petitioner Lee NMI Robbins to [7-1] (bp) [Entry date 06/06/94]
- 6/2/94 16 NOTICE of typographical error in traverse. by petitioner Lee NMI Robbins (bp) [Entry date 06/08/94]
- 6/3/94 15 NOTICE of lodging of documents in District Court by respondent George NMI Smith, respondent AGCA (bp) [Entry date 06/06/94]
- 9/8/94 17 MINUTES: Having reviewed the briefing in this case, the crt deems it in the interest of justice to appoint cnsl to represent petitioner on at least one of the issues raised in the petition. Accordingly, Ronald J. Nessim is hereby appointed to represent petitioner.; mandatory status conference set on 9:00 9/20/94 by Magistrate Judge George H. King CR: none (bp) [Entry date 09/13/94]

9/14/94 18 NOTICE of continuance of MSC;  
mandatory status conference set on 9:00  
9/23/94 (bp) [Entry date 09/15/94]

Docket as of January 16, 1996 11:08 am

Proceedings include all events. TERMED  
2:94cv1157 APPEAL  
Lee Robbins v. George Smith, et al.

- 9/23/94 19 MINUTES: Pla's brief shall be fld NLT  
12/23/94. Dft's opposition shall be fld  
1/23/94. Dft's opp shall be fld NLT  
1/23/95. Pla's reply, if any, shall be fld  
NLT 2/23/95, & oral argument shall be  
heard at 9:00 a. on 3/7/95. by Discovery  
Andrew J. Wistrich CR: tape #148 (bp)  
[Entry date 09/27/94]
- 12/5/94 20 NOTICE by petitioner Lee NMI Robbins  
of change of address (bp) [Entry date  
12/26/94]
- 12/21/94 21 STIPULATION and ORDER by  
Magistrate Judge George H. King; IN  
COURT HEARING RE: Petitioner  
Anders claim set on 3/14/95 Petitioner's  
supplemental brief must be fld on or bef  
12/30/94: The states opposition brief,  
which was formerly to be fld on 1/23/95,  
must now be fld on or bef 1/30/95: &  
Petitioner's reply brief, which was formerly  
to be fld on 2/23/95, must now be fld on  
or bef 3/2/95. (bp) [Entry date 12/31/94]
- 12/30/94 22 SUPPLEMENTAL Brief re Habeas  
petition: declarations of Jerome H.  
Friedberg & Lee Robbins in support by  
petitioner Lee NMI Robbins (bp) [Entry  
date 01/03/95]
- 1/25/95 23 EX PARTE APPLICATION by  
respondent George NMI Smith,



respondent AGCA to file memo over 35 pages (dh) [Entry date 02/02/95]

- 1/25/95 -- LODGED/PROPOSED Order (FWD TO CRD) (dh) [Entry date 02/02/95]
- 1/26/95 24 ADDENDUM by petitioner Lee NMI Robbins to [22-1] (dh) [Entry date 02/02/95]
- 1/26/95 26 ORDER by Magistrate Judge George H. King granting application [23-1] lv ti file memo of P/A in excess of 35 pages (sb) [Entry date 02/22/95]
- 1/30/95 25 SUPPLEMENTAL return; memorandum of points & authorities, exhibits & declaration of David Goodwin in support by respondent George NMI Smith re answer response [7-1] (we) [Entry date 02/02/95]
- 3/2/95 27 REPLY by petitioner Lee NMI Robbins to supplemental return [25-1] (dh) [Entry date 03/10/95]
- 3/10/95 28 MINUTES;; IN COURT HEARING cont'd from 3/14/95 to 9:00 4/18/95 by Magistrate Judge George H. King CR: none (jw) [Entry date 03/17/95]
- 3/28/95 31 NOTICE by Court of hearing; status hearing cont until 9:00 5/2/95 (dh) [Entry date 05/03/95]

Docket as of January 16, 1996 11:08 am

Proceedings include all events.  
2:94cv1157

TERMED  
APPEAL

Lee Robbins v. George Smith, et al.

- 3/31/95 29 REQUEST by respondents to cite new decision in suppt of respndts' suppl return (dh) [Entry date 05/01/95]
- 4/3/95 32 MINUTES: On 3/31/95, respondents filed a req to cite new decision in suppt of respndts' supplemental return. Petr shl have to & thru 4/17/95 in which to file a resp. by Magistrate Judge George H. King CR: n/a (dh) [Entry date 05/03/95]
- 4/11/95 30 REPLY by petitioner Lee NMI Robbins re [29-1] (dh) [Entry date 05/01/95]
- 5/1/95 34 MINTUES: ; resetting status hearing set on 9:30 5/9/95 by Magistrate Judge George H. King CR: N/A (we) [Entry date 05/23/95]
- 5/9/95 33 MINUTES: Case called. Cnsl make their appearances. Oral argument held with cnsl. Crt ords plf to file fur briefing within 10 days hereof. Dfts to file their brief 10 days thereafter. by Magistrate Judge George H. King CR: Tape #173 & 174 (we) [Entry date 05/22/95]
- 5/19/95 35 Respondent's post-argument addendum to supplemental return: memo of p'a & a's & exhibit in support: attorney for respondents (bp) [Entry date 06/05/95]

- 5/26/95 36 REPLY by petitioner Lee NMI Robbins to respondent's post argument addendum to supplemental return [35-1] (we) [Entry date 06/08/95]
- 7/24/95 37 ORDER TRANSFERRING ACTION UNDER SECTION 3.1 of G.O. 224 by Judge A. W. Tashima Case reassigned to Judge George H. King for all further proceedings, ter terminating case referral to Magistrate Judge George H. King (cc: all ptys) (es) [Entry date 07/31/95]
- 10/24/95 38 ORDER by Judge George H. King granting habeas corpus petition [1-1], to the extent that petr shl be discharged frm custody on the subj conviction unless the 9th CCA accepts juris over petr's direct app w/i 30 dys, Resp shl notify the 9th CCA of this crts ord. (mm) [Entry date 10/26/95]
- 10/24/95 39 JUDGMENT: by Judge George H. King. granting habeas corpus petition [1-], to the extent that petr shl be discharged from custody on the subj conviction unless the 9th CCA accepts juris over petr's direct app w/i 30 dys; & Resp's shl notify the 9th CCA of this crts ord. terminating case (ENT 10/26/95) MD JS-6 (cc: all counsel) mm [Entry date 10/26/95]

- 10/26/95 40 NOTICE OF APPEAL by respondent to 9th C/A from Dist. Court Jgm ent 10/26/95. (cc: Carol Frederick Jorstad; Bird, Marella, Boxer, Wolpert & Metz) Fee: Waived. (pjap)

Docket as of January 16, 1996 11:00 am

Proceedings include all events.      TERMED  
2:94cv1157      APPEAL  
Lee Robbins v. George Smith, et al.

[Edit date 11/01/95]

- 10/26/95 41 APPLICATION by respondent George NMI Smith for stay; memo of PA in support thereof; decl of Carol Frederick Jorstad in support. (we) [Entry date 11/01/95]
- 10/26/95 -- LODGED/PROPOSED Order (FWD TO CRD) (we) [Entry date 11/01/95]
- 10/30/95 42 MINUTES: Petitioner is hereby granted 10 days to file & serve a response, if any, to the respondent's application for stay. by Judge George H. King CR: N/A (we) [Entry date 11/07/95]
- 11/7/95 43 TRANSCRIPT DESIGNATION and ordering form. (pjap) [Entry date 11/08/95]
- 11/9/95 44 OPPOSITION by petitioner Lee NMI Robbins to respondent's appl for stay [41-1]; decl of Ronald J Nessim. (we) [Entry date 11/16/95]
- 11/13/95 45 REPLY by respondent George NMI Smith to petitioner's opposition to respondent's request for stay; decl of Carol Frederick Jorstad. (we) [Entry date 11/17/95]

- 11/14/95 46 PROPOSED ORDER by Judge George H. King that this crt's ord in the above-entitled case be stayed during the pendency of the appeal before the Ninth Circuit. (we) [Entry date 11/21/95]
- 11/22/95 47 NOTICE OF APPEAL by petitioner Lee NMI Robbins to 9th C/A from Dist. Court jgn & ord filed 10/24/95. (cc: Bird, Manella, Boxer, Wolpert & Matz, Carol Frederick Jorstad.) Fee: CPC Pending. (dl) [Entry date 11/27/95] [Edit date 12/04/95]
- 11/22/95 48 NOTIFICATION by Circuit Court of Appellate Docket Number 95-56640 (app) [Entry date 12/01/95]
- 11/28/95 49 MEMORANDUM by Judge George H. King RE: Fees & costs under the CJA. (we) [Entry date 12/05/95]
- 12/7/95 50 MEMORANDUM AND ORDER by Judge George H. King denying application for certificate of probable cause. (we) [Entry date 12/19/95]
- 12/29/95 51 TRANSCRIPT DESIGNATION and ordering form for dates: Tape # 173, 174 CR: Dorothy Babykin (fvap) [Entry date 01/11/96]

Docket as of January 16, 1996 11:08 am



GENERAL DOCKET FOR  
Ninth Circuit of Appeals

Court of Appeals Docket #: 95-56640  
 Filed: 11/21/95  
 Nsuit: 3530 Habeas corpus (Fed)  
 Robbins v. Smith  
 Appeal from: Central District of California,  
 Los Angeles

-----  
 Case type information:

- 1) prisoner petition
  - 2) state
  - 3) habeas corpus
- 

Lower court information:

District: 0973-2 : CV-94-01157-GHK  
 presiding judge: George H. King, Magistrate  
 court reporter: Donna Stephenson, CSR  
 COORDINATOR  
 Date Filed: 2/24/94  
 Date order/judgment: 10/24/95  
 Date NOA filed: 10/26/95

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 Fee status: paid  
 -----

Prior cases:

None

Current cases:

	Lead	Member	Start	End
cross appeal:				
	95-56640	96-55063	1/18/96	

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Docket as of January 19, 1999 1:04 am

Proceedings include all events.  
95-55640 Robbins v. Smith

LEE NMI ROBBINS Petitioner - Appellee	Ronald J. Nessim, Esq. 310-201-2100 23rd Floor [COR LD NTC ret] Elizabeth A. Newman, Esq. 310/201-2100 23rd Floor [NTC] BIRD, MARELLA, BOXER & WOLPERT A Professional Corporation 1875 Century Park East Los Angeles, CA 90067 -2561
--	---

v.

GEORGE NMI SMITH, Warden, California Department of Corrections Respondent - Appellant	Carol Frederick Jorstad (213) 897-2000 [COR LD NTC dag] ATTORNEY GENERAL'S OFFICE 300 South Spring Street Los Angeles, CA 90013
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Docket as of January 19, 1999 1:04 am

Proceedings include all events.  
95-56640 Robbins v. Smith

LEE NMI ROBBINS

Petitioner - Appellee

v.

GEORGE NMI SMITH, Warden, California  
Department of Corrections

Respondent - Appellant

Docket as of January 19, 1999 1:04 am

Proceedings include all events.  
95-56640 Robbins v. Smith

- 11/21/95 DOCKETED CAUSE AND APPEARANCES OF COUNSEL. CADS SENT (Y/N): n. setting schedule as follows: appellant's designation of RT is due 11/6/95 for George NMI Smith; appellees's designation of RT is due 11/15/95; appellant shall order transcript by 11/27/95; court reporter shall file transcript in DC by 12/26/95; certificate of record shall be filed by 1/2/96; appellant's opening brief is due 2/12/96; appellees' brief is due 3/12/96; appellants' reply brief is due 3/26/96; [95-56640] (jhc) [95-56640]
- 11/21/95 Filed certificate of record on appeal RT filed in DC N.T. [95-56640] (jhc) [95-56640]
- 1/5/96 Filed Aplt's request for certificate of probable cause; declaration of Elizabeth A. Newman with exhibits in support; served on 1/4/96 (Moatt) [2931816] [95-56640] (gva) [95-56640]
- 1/26/96 Filed MOATT order (Cynthia H. HALL, Melvin BRUNETTI,): To the extent a cpc is necessary, Lee Robbins' request for cpc in cross-appeal no. 96-55063 is granted.... The dc grant of ifp statu adn appt of csl for Robbins shall continue on appeal... The clk shall change this ct's docket to so reflect. The following briefing schedule shall govern cross-appeal nos. 95-56640 & 96-55063: the state's opening brief and excerpts of record are due

2/12/96; Robbins' ans/opening brief is due 3/22/96; the state's ans/reply brief is due 4/22/96; Robbins' optional reply brief is due 14 days after service of the state's ans/reply brief. [95-56640, 96-55063] (tsp) [95-56640] 96-55063]

- 1/29/96 Filed certified record on appeal in 4 Vols. (total): 4 Clerks Rec (Orig) [96-55063, 95-56640] [96-55063, 95-56640] (wp) [95-56640 96-55063]
- 1/31/96 Received from DC copies that comprise the excerpts of record. (RECORDS) [96-55063, 95-56640] (rf) [95-56640 96-55063]
- 2/5/96 14 day oral extension by phone to file George NMI Smith in 95-56640, George Smith in 96-55063's cross-appeal brief. [95-56640, 96-55063] first cross-appeal brief due 2/26/96 in 95-56640, in 96-55063; second cross-appeal brief due 4/8/96 in 95-56640, in 96-55063; third cross-appeal brief due 5/8/96 in 95-56640, in 96-55063; optional reply brief due 14 days from service of the answering brief (cb) [95-56640 96-55063]
- 2/28/96 Filed original and 15 copies aplt/x-ape George NMI Smith's first brief on cross-appeal, (Informal: n) of 54 pages and 5 excerpts of record in 1 vol.; served on 2/26/96 [95-56640, 96-55063] (hh) [95-56640 96-55063]

Docket as of January 19, 1999 1:04 am

Proceedings include all events.  
95-56640 Robbins v. Smith

- 3/4/96 Filed (Promo) motion & clerk order: (Deputy: cag) The request for judicial notice and any responsive filings shall be referred to the merits panel for disposition. (mtn rcvd 2/28/96) ... [2961636-1] [95-56640, 96-55063] (gva) [95-56640 96-55063]
- 4/2/96 14 day oral extension by phone to file Appellee in 95-56640, Appellant in 96-55063's cross-appeal brief. [95-56640, 96-55063] second cross-appeal brief due 4/22/96 in 95-56640, in 96-55063; third cross-appeal brief due 5/22/96 in 95-56640, in 96-55063; optional reply brief due 14 days from service of the third brief (cb) [95-56640 96-55063]
- 4/23/96 Filed original and 15 copies Lee NMI Robbins second brief on cross-appeal (Informal: n) of 68 pages/13,868 words and 5 excerpts of record in 2 vols., served on 4/22/96 [95-56640, 96-55063] (rei) [95-56640 96-55063]
- 4/23/96 Filed Lee Robbins' opposition to request for judicial ntc, served on 4/22/96. (RECORDS FOR MERITS PANEL) [2961636-1] [95-56640, 96-55063] (rc) [95-56640 96-55063]
- 5/17/96 14 day oral extension by phone to file George NMI Smith in 95-56640, George Smith in 96-55063's cross-appeal reply/answering brief. [95-56640, 96-55063] third cross-appeal brief

due 6/5/96; x-appeal reply brief due 14 days... (jlc) [95-56640 96-55063]

- 6/5/96 Filed original and 15 copies aplt/x-appe George NMI Smith's third brief on cross-appeal (Informal: no) of 36 pages (minor defcy: brief has gray covers instead of red); served on 6/3/96 [95-56640, 96-55063] (gail) [95-56640 96-55063]
- 6/5/96 Filed res/aplts-x-appe (Smith, et al.) reply to the opposition to the request for judicial ntc; served on 6/3/96. (RECORDS for MERITS PANEL). [2961636-1] [95-56640, 96-55063] (rc) [95-56640 96-55063]
- 6/13/96 14 day oral extension by phone to file Lee NMI Robbins in 95-56640, Lee Robbins in 96-55063's cross-appeal brief. [95-56640, 96-55063] cross-appeal reply brief due 7/5/96 in 95-56640, in 96-55063; (cb) [95-56640 96-55063]
- 6/17/96 Rcvd Aplt/x-appe's (George NMI Smith) satisfaction of minor dfcy (15 red covers for third x-appeal brief) [95-56640, 96-55063] (gail) [95-56640 96-55063]
- 7/8/96 Filed original and 15 copies aple/x-aplt Lee NMI Robbins' reply brief of 29-pgs with cert of compliance (Informal: no); served on 7/5/96 [95-56640, 96-55063] (gail) [95-56640 96-55063]



Docket as of January 19, 1999 1:04 am

Proceedings include all events.  
95-56640 Robbins v. Smith

- 7/15/96 Filed certificate of record on appeal RT filed in DC 3/7/96 [95-56640] (rmw) [95-56640]
- 7/15/96 Calendar check performed [95-56640, 96-55063] (mw) [95-56640 96-55063]
- 8/6/96 Calendar materials being prepared. [95-56640, 96-55063] [95-56640, 96-55063] (mw) [95-56640 96-55063]
- 8/9/96 CALENDARED: PASA Oct 8 1996 9:00 am Courtroom 1 [95-56640, 96-55063] (aw) [95-56640 96-55063]
- 10/7/96 Filed aple/x-aplt Lee Robbins' additional citations, served on 10/7/96 (faxed to PAS for panel) [95-56640, 96-55063] (hh) [95-56640 96-55063]
- 10/8/96 ARGUED AND SUBMITTED TO Procter R. HUG, Harry PREGERSON, Stephen R. REINHARDT [95-56640, 96-55063] (rmw) [95-56640 96-55063]
- 10/11/96 Filed aple/x-aplt Lee NMI Robbins' additional citations, dated 10/7/96 (to PANEL) [95-56640, 96-55063] (hh) [95-56640 96-55063]

- 9/23/97 FILED OPINION: AFFIRMED IN PART but the case is REMANDED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Procter R. HUG, author; Harry PREGERSON; Stephen R. REINHARDT.) FILED AND ENTERED JUDGMENT. [95-56640, 96-55063] (sf) [95-56640 96-55063]
- 10/15/97 Filed original and 40 copies Appellant George NMI Smith Appellant Lee Robbins petition for rehearing with suggestion for rehearing en banc. (PANEL AND ALL ACTIVE JUDGES) 21 p.pages, served on 10/6/97 [95-56640, 96-55063] (sf) [95-56640 96-55063]
- 8/13/98 Filed amended opinion (Judges Procter R. HUG, Harry PREGERSON, Stephen R. REINHARDT) (Orig. opinion id:) [95-56640, 96-55063] (sf) [95-56640 96-55063]
- 8/21/98 Filed aplt's/x-able's (Smith) mtn for clarification and for a stay of the mandate and for leave to file a supp'l rehearing petition; served on 8/19/98. (PANEL) [95-56640, 96-55063] [95-56640, 96-55063] (rc) [95-56640 96-55063]
- 9/24/98 Filed order (Procter R. HUG, Harry PREGERSON, Stephen R. REINHARDT): The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. (SEE TEXT) The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED. The motion for clarification and for a stay of the mandate and for leave to file a supplemental

rehearing petition is DENIED. in 95-56640, 96-55063 [95-56640, 96-55063] (sf) [95-56640 96-55063]

Docket as of January 19, 1999 1:04 am

Proceedings include all events.  
95-56640 Robbins v. Smith

- 10/6/98 Received Appellee Lee NMI Robbins "FAXED" letter dated 10/5/98 re: aple is preparing to submit an opposition to the state's motion. (LETTER IS MOOT ORDER WAS FILED 9.24.98) [95-56640, 96-55063] (sf) [95-56640 96-55063]
- 10/6/98 Filed Appellee Lee NMI Robbins response opposition to Smith's cross-appeal motion to stay the mandate. served on 10/5/98 (MOTION IS MOOT) [95-56640, 96-55063] (sf) [95-56640 96-55063]
- 10/6/98 Rec'd notice of change of address from Elizabeth A. Newman for Appellee Lee NMI Robbins dated 10/5/98. (CASEFILE) [95-56640, 96-55063] (sf) [95-56640 96-55063]
- 10/19/98 Filed FAXED copy of aplt/x-ape's (Smith) mtn to stay mandate pending petition for cert; served on 9/28/98. (Never recvd document when it was originally sent) (FAXED to PRH) [95-56640, 96-55063] [95-56640, 96-55063] (rc) [95-56640 96-55063]
- 10/19/98 Filed aple/x-aplt's (ROBBINS) opposition to stay mandate; served on 10/5/98. [3547336-1] (Note: this document was original filed on 10/6/98 before we recvd the mtn to stay mandate) (FAXED TO PRH) [95-56640, 96-55063] (rc) [95-56640 96-55063]

10/26/98 Filed order (Procter R. HUG,): The "Motion to Stay the Mandate to Permit Respondent to File a Petition for Writ of Certiorari" is GRANTED. in 95-56640, 96-55063 [95-56640, 96-55063] (ft) [95-56640 96-55063]

11/25/98 Filed aplt/cross-aple Smith's mtn to extend stay of mandate (faxed to PRH) [95-56640, 96-55063], served on 11/23/98 [95-56640, 96-55063 (db) [95-56640 96-55063]

12/2/98 Filed order (Procter R. HUG): The motion to extend the stay of mandate an additional 30 days is granted. in 95-56640, 96-55063 [95-56640, 96-55063] (sf) [95-56640 96-55063]

1/7/99 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 98-1037 filed on 12/17/98 and placed on the docket 12/2/98.. [95-56640, 96-55063] (rc) [95-56640 96-55063]

Docket as of January 19 1999 1:04 am

IN THE COURT OF APPEAL OF THE  
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE OF THE STATE	)	
OF CALIFORNIA,	)	2d Crim. No. B054733
	)	Superior Court
Plaintiff and Respondent,	)	No. A 481636
	)	
vs.	)	
	)	
LEE ROBBINS,	)	
	)	
Defendant and Appellant,	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF LOS  
ANGELES COUNTY  
HONORABLE ROBERT W. ARMSTRONG,  
JUDGE PRESIDING

APPELLANT'S OPENING BRIEF

REQUEST FOR INDEPENDENT REVIEW OF  
RECORD PURSUANT TO  
PEOPLE v. WENDE (1979) 25 Cal. 3d 436

David H. Goodwin  
P.O. Box 93579  
Los Angeles, CA 90093-0579  
(213) 666-9960

Attorney for Appellant

## STATEMENT OF THE CASE

This is an appeal pursuant to Penal Code Section 1237 from a judgment of conviction of violation of one count each of Penal Code Section 187(a)<sup>1</sup> (murder) and 487(3) (Grand theft of an automobile).

Appellant was charged by information with one count of violation of Section 187(a) and one count of Section 487(3). It was further alleged that in the commission of the murder appellant personally used a firearm within the meaning of Sections 1203.06(a)(1) and 12022.5 (CT 106-107).

On December 19, 1989, appellant was arraigned in the Superior Court for the County of Los Angeles, Department SE J, before the Honorable J. A. Torribio. At that time Appellant entered a plea of not guilty (CT 108).

On December 20, 1989, Judge Torribio suspended proceeding pending a determination of appellant's competency pursuant to § 1368 (CT 109).

On March 1, 1990, the Honorable C. Robert Simpson, presiding in Department SE J, found appellant competent to stand trial, and proceedings were resumed. On that date the court also denied appellant's motion pursuant to People v. Marsden (1970) 2 Cal.3d 118 (CT 143).

On March 7, 1990, Judge Simpson denied another Marsden motion, and granted appellant's request to proceed in propria persona (CT 144).

On August 17, 1990, the cause was called to trial before the Honorable R. Armstrong, presiding in the Superior Court for the County of Los Angeles, Department SE F (CT 200).

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1. All further undesignated statutory references are to the Penal Code.

On August 22, 1990, the jury returned a verdict of guilty of one count second degree murder and one count of grand theft of an automobile. It was further found that in the commission of the murder appellant personally used a firearm within the meaning of Sections 12022.5(a) and 1203.06(a)(1) (CT 248-251).

On September 5, 1990, Judge Armstrong sentenced appellant as follows: For Count 1, a sentence of fifteen years to life imprisonment, plus 2 years pursuant to Section 12022.5 for a total of seventeen years to life. For Count 2, the mid term sentence of two years imprisonment, to be served consecutively to the sentence imposed for Count 1. However, the sentence for Count 2 was stayed, that stay to become permanent pending the completion of the sentence for count 1. Appellant was given credit for 658 days (CT 251-252).

On September 6, 1990, a Notice of Appeal was filed bringing this case before this Court (C.T. 253-254).

## STATEMENT OF THE FACTS

Alvin York Curtis, lived next door to Spaulding (the decedent in this case) during the summer of 1988<sup>2</sup>. During that summer, appellant was living in the converted garage of Spaulding's residence (RT 75-76, 91). At about 6:30 p.m. on December 31, 1989, Mr. Curtis heard two sets of gunshots, separated from each other by a pause of a couple seconds. Each set consisting of several shots, and each set sounding distinct from the other (RT 76-78). At that time Mr. Curtis thought that the sounds were gunshots from New Year's Eve revelers (RT 78-79).

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2. Unless otherwise indicated all events referred to herein occurred on December 31, 1988.



Spaulding had frequent arguments with his wife, and at one time he was arrested for assaulting her. (RT 81, 89-90).

Dona Medina, another neighbor of the victim, also heard gunshots at that time, and described them as having two distinct sounds, the first three having a sharp sound, and the next four or five shots having a more muffled sound. (RT (84-85).

Mrs. Medina knew of one occasion where a woman claimed that Spaulding had beaten her because she would not sleep with him (RT 89). Mrs. Medina also testified that on one occasion Spaulding's house was vandalized, and Spaulding then made a phone call from her house, telling the person he called that he knew that "Lee" had been the one who vandalized his house (RT 89).

Maria Romero, another neighbor of Spaulding heard the shots (RT 95). Shortly after hearing the shots she saw a man standing in front of her house. The person told her that he was looking for his dog who ran away after being scared by fireworks (RT 96-98).

Mrs. Romero and her daughter then went to the Fayva shoe store where they purchased some shoes. The receipt from the shoe store indicated the time of purchase as 6:47 p.m. (RT 98, 100). Mrs. Romero was unable to identify the man who was looking for the dog, although she described him to the police as being five feet six inches to five feet eight inches, 25 to 30 years old, and having dark short curly hair (RT 102, 104-105).

Stanley Curatola, Spaulding's roommate, testified that he left their residence on New Year's Eve before noon (RT 110-111), and spent the day with a variety of friends at various bars and restaurants. He returned to his residence, along with some of his friends from the bars, at about 8:00 (RT 111-114). Returning home he found that a rear window had been broken. Opening the curtain to the window he saw Spaulding

lying on his face on the floor in a pool of blood (RT 114-116). Spaulding's gun was on the floor next to him. Curatola told his friend to call the police, and waited outside until they arrive (RT 117).

Curatola testified that he knew that Spaulding had been having an ongoing dispute with another roommate, whom Curatola eventually discovered to be appellant. (RT 118, 120)

Arriving at the Spaulding residence at about 11:00 p.m., Deputy Sheriff Cox observed a Smith and Wesson .38 caliber revolver (People's Exhibit 9) with five expended rounds lying next to Spaulding's body (RT 170, 172-173, 176). Bullet holes were observed in the door to the service porch, going from the inside of the residence to the outside, and the window on that door had been shattered (RT 173-174).

When Deputy Cox interviewed appellant after his arrest, appellant admitted being in the area of the Spaulding residence around dusk on December 31, 1988 (RT 180). In that statement appellant stated that he was on his way home when he stopped to let his dog relieve itself. He lost sight of the dog, and had asked a "Mexican couple" at the corner of Claretta and Gradwell if they had seen it. He later found the dog in a parking lot across the street (RT 180-181).

Richard Lee, appellant's brother-in-law testified that in December of 1988, appellant was living in a trailer in the backyard of Lee's residence (RT 125). Some time in mid December, Mr. Lee asked appellant to stay at another property he owned in Santa Fe Springs, and watch that property for Lee, but that appellant had returned to Mr. Lee's residence on at least one occasion in January of 1989, and that appellant would have had access to Mr. Lee's garage (RT 125-126, 141-142).

As part of a firearm collection, Mr. Lee owned a .45 caliber Colt Commander automatic pistol

(People's Exhibit 3). That weapon was normally kept in a gun safe in his garage. (RT 126-128).

Lee testified that appellant had access to the garage. Although the gun safe was usually locked, Mr. Lee kept the lock set so that he only had to roll the combination to zero so that he had easy access to the safe. Mr. Lee was sure that appellant had seen him open the safe in that manner (RT 128-129).

Some time in mid December this gun disappeared from Mr. Lee's possession. It later reappeared in mid January. Mr. Lee did not know where the weapon was during this time (RT 129, 143).

Mr. Lee testified that another gun had also disappeared from his collection in late November or early December, when he had taken it to a gun shop in Riverside, accompanied by appellant, to have some work done on the gun. (RT 129-131)

Mr. Lee further testified that he had loaned appellant People's Exhibit 3 earlier in October of 1988, and appellant had returned the gun on November (RT 132-133).

Mr. Lee testified that when the police initially visited him in January of 1989 he had lied to them, telling them that he only had one .45 automatic, when, in fact, he had five. Mr. Lee had taken the weapons to his father's house, where he had left them for a month or two, because he was concerned that if the police took the weapons they would not return them (RT 133-134).

Mr. Lee further testified that the police visited him again in October of 1989, and at that time he admitted that he lied earlier. He also gave them several .45 automatics, including People's Exhibit number 3. At the time that he handed over People's Exhibit number 3, it had an electron sight on it that had been put on the gun after he had retrieved it from his father's house (RT 134-136).

Mr. Lee testified that on January 10, 1989, appellant had asked him if he had been interviewed by the police. He told Robbins not to let the police have the gun, because he was afraid that the police would dummy up ballistics tests and frame him for Spaulding's murder (RT 145-146).

At that time appellant asked Lee for a vehicle. Lee offered to let appellant use a Blazer that was at Lee house. Lee and appellant went to Lee's place of work in a truck that Lee was borrowing from his father. Lee left the keys to that truck of his office desk, and later discovered that the keys, the truck and appellant were missing (RT 146-148).

Some time later the truck was discovered in Arizona near the New Mexico border. Lee had not give appellant permission to take the truck (RT 148-149).

On January 7, 1989, Deputy Cox spoke to Lee and requested permission to search the trailer on Lee's property that appellant had been staying in. (RT 186-187). On January 12th, Cox again went to Lee's residence where he searched the garage (RT 192).

On October 3, 1989, Cox again spoke to Lee, and Lee informed Cox that he had been lying to Cox about the number of guns that he had. Lee then handed over all his .45s to Cox, and Cox had the weapons test fired. He returned all of the weapons to Lee, and after the test results were complete he re-obtained People's Exhibit 3 (RT 195-197).

Deputy Cox further testified that the police had removed a piece of carpeting from the Spaulding residence because they had initially thought that it was blood stained. However, that carpeting was destroyed when tests determined that the stain was not blood (RT 205-206).

He testified that because of the possibility that the stain on the carpet may have been blood and the fact that one weapon had apparently been fired from

inside the house to the outside, the initial bulletin that they had issued mentioned that the suspect might have been wounded (RT 206-207).

It was stipulated that appellant had never received any gunshot wounds (RT 223-224)

Dr. Sara Reddy, a deputy medical examiner for the Los Angeles County coroner's office, performed the autopsy on Spaulding. She determined that Spaulding had been shot five times, and gave multiple gunshot wounds as the cause of death (RT 219). She testified that death would have been "very quick" (RT 221).

On the afternoon of December 31, 1988, appellant was visiting Pat Cano in Hawaiian Gardens (RT 228-229, 269-270). At that time he showed Vincent Nylin, Cano's boyfriend, a .45 Colt commander and a TEC-9 nine-millimeter revolver (RT 237-239).

Deputy Van Horn of the scientific Services Bureau, recovered a .38 caliber Smith and Wesson revolver, several expended .45 Caliber cartridge cases, and bullets from a .45 caliber and a .38 caliber gun (RT 242-243).

The .45 caliber cartridge casings were found outside the side door to the residence (RT 246). Two .45 caliber bullets were recovered from the rear wall (RT 247-248). Four .38 caliber bullets were found in the area around the rear door (RT 249).

After testing the weapons involved, Deputy Van Horn concluded that the .38 caliber bullets found were fired from the Smith and Wesson recovered at the scene. He further found that the .45 caliber bullets recovered from the scene and the bullets given to him by the Coroner's office were all fired from People's Exhibit Number 3 (RT 254, 256-257).

In Deputy Van Horn's opinion, the bullets from the .45 caliber were fired from outside the house

to the inside, while the bullets from the .38 caliber were fired from the inside to the outside (RT 264).



## ARGUMENT

APPELLANT REQUESTS THAT THIS COURT  
INDEPENDENTLY EXAMINE THE ENTIRE  
RECORD ON APPEAL

Pursuant to People v. Wende (1979) 25 Cal. 3d 436, counsel requests that this court independently review the entire record on appeal for arguable issues.

Present counsel has advised appellant that appellant may file a supplemental brief with the court within 30 days and may request the court to relieve present counsel. Present counsel remains available to brief any issues(s) upon invitation of the court. (See Declaration attached hereto.)

DATED: October 1, 1991      Respectfully submitted,

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David H. Goodwin  
Attorney for Appellant

DECLARATION OF DAVID H. GOODWIN  
IN SUPPORT OF REQUEST FOR  
INDEPENDENT JUDICIAL REVIEW OF  
THE ENTIRE APPELLATE RECORD

I, David H. Goodwin, declare as follows:

I am the attorney appointed to represent appellant, Lee Robbins, in his appeal following judgment of conviction for violation of Penal Code §§ 187(a) and 487(3).

I have reviewed the entire record on appeal, consisting of the Clerk's Transcript (1 volume), the Reporter's Transcript (1 volume), and the Augmented Reporter's Transcripts (1 volume); examined the superior court file and exhibits from appellant's trial; and discussed appellant's case with trial counsel.

I have written to appellant at his current address, Lee Robbins, E-69926, 1-1A-30, P.O. Box W, Repressa, Ca 95671, explaining my evaluation of the record on appeal and my intention to file this pleading. I have also informed him of his right to file a supplemental brief. I have sent appellant the transcripts of the record on appeal and a copy of this brief.

I do not at this time move to withdraw as counsel of record for appellant and I remain available to brief any issues that the Court requests. I have also advised appellant that he may request this court to relieve me.

I declare under penalty of perjury that the foregoing is true and correct and that I signed this declaration on October 1, 1991, at Los Angeles, California.

---

David H. Goodwin



PROOF OF SERVICE BY MAIL (C.C.P. SEC. 1013.A,  
2015.5)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a resident of the aforesaid county; I am  
over the age of eighteen years and not a party to the  
within entitled action; my business address is

P. O. Box 93579, Los Angeles, Ca 90093-0579

On October 1, 1989 I served the within Statement  
by Counsel on Appeal Pursuant to People v. Wende  
on the interested parties in said action, by placing a true  
copy thereof enclosed in a sealed envelope with postage  
thereon fully prepaid, in the United States mail at Los  
Angeles, California addressed as follows:

The Attorney General	Hon. Robert W. Armstrong
300 South Spring St.	Superior Court, Dept. SE F
Room 500	12720 Norwalk Blvd.,
Los Angeles, Ca 90013	Norwalk, Ca 90650

District Attorney's Office  
12720 Norwalk Blvd., Room 201  
Norwalk, Ca 90650

Lee Robbins, E-69926  
1-1A-30  
P.O. Box W  
Repressa, Ca 95671

Executed on October 1, 1991, at Los Angeles, California  
I declare under penalty of perjury that the foregoing is  
true and correct.

DAVID H. GOODWIN

COURT OF APPEAL - SECOND DIST.

FILED

DECEMBER 12, 1991

ROBERT N. WILSON, CLERK

NOT FOR PUBLICATION IN  
THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE  
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,	)	No. B054733
	)	
Plaintiff and	)	(Super.Ct.No. A481636)
Respondent,	)	
	)	
v.	)	
	)	
LEE ROBBINS,	)	
	)	
Defendant and	)	
Appellant.	)	
	)	

APPEAL from a judgment of the Superior  
Court of Los Angeles County. Robert W. Armstrong,  
Judge. Affirmed.

David H. Goodwin, under appointment by the  
Court of Appeal, for Defendant and Appellant.

No appearance on behalf of the People,  
Plaintiff and Respondent.

Lee Robbins appeals from the judgment  
entered following a jury trial that resulted in his  
conviction of second degree murder with the use of a  
firearm and grand theft of an automobile. (Pen. Code,

§§ 187, 487, subd. 3, 12022.5, subd. (a).) He was sentenced to 17 years to life in state prison. We appointed counsel to represent him on this appeal.

After examination of the record, counsel filed an "Opening Brief" in which no issues were raised. On October 28, 1991, we advised appellant that he had 30 days within which to personally submit any contentions or issues which he wished us to consider. In a six-page handwritten document filed November 15, 1991, appellant claims that the evidence is insufficient to support his conviction and he was denied due process by the People's suppression of exculpatory evidence. These claims find no support in the record.

We have examined the entire record and are satisfied that appellant's attorney has fully complied with his responsibilities and that no arguable issues exist. (People v. Wende (1979) 25 Cal.3d 436, 441.)

The judgment is affirmed.

NOT FOR PUBLICATION IN  
THE OFFICIAL REPORTS

COOPER, J.\*

We concur:

WOODS (Arleigh), P.J.

EPSTEIN, J.

\*Assigned by the Chairperson of the Judicial Council.

SUPREME COURT  
FILED  
OCTOBER 21, 1992  
ROBERT WANDRUFF CLERK  
DEPUTY

Second Appellate District, Division Four, No. B069441  
S028833

IN THE SUPREME COURT OF THE  
STATE OF CALIFORNIA

IN BANK

---

LEE ROBBINS, Petitioner

v.

LOS ANGELES COUNTY SUPERIOR COURT, Respondent  
THE PEOPLE, Real Party In Interest

---

Petition for review DENIED.

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GEORGE

Acting Chief Justice

SUPREME COURT  
FILED  
SEPTEMBER 29, 1993  
ROBERT WANDRUFF CLERK  
DEPUTY

ORDER DENYING WRIT OF HABEAS CORPUS

No. S033312

IN THE SUPREME COURT OF THE  
STATE OF CALIFORNIA

IN BANK

---

IN RE LEE ROBBINS

ON

HABEAS CORPUS

---

Petition for writ of habeas corpus DENIED on the  
merits.

LUCAS  
Chief Justice

SUPREME COURT  
FILED  
JANUARY 26, 1994  
ROBERT WANDRUFF CLERK  
DEPUTY

ORDER DENYING WRIT OF HABEAS CORPUS

No. S036062

IN THE SUPREME COURT OF THE  
STATE OF CALIFORNIA

IN BANK

---

IN RE LEE ROBBINS

ON

HABEAS CORPUS

---

Petition for writ of habeas corpus DENIED. (See In re  
Dixon (1953) 41 Cal.2d 756, 759.)

LUCAS  
Chief Justice

## Declaration of David Goodwin

I, David Goodwin, hereby declare as follows:

1. I am a attorney licensed to practice law in California.
2. I was the appointed attorney in People v. Robbins, Court of Appeal No. B054733.
3. It has been 39 months since I filed the brief in this matter, and I do not recall all of the specifics. However, to the best of my recollection, appellant pointed out many issues to me. I attempted to consider most of the issues he mentioned. As to some, I thought they were not meritorious on their face. As to the others that I attempted to research I thought they were not meritorious.
4. Prior to the filing a brief, I filed with consulted with California Appellate Project, and received their permission to file a Wende brief.

I declare under penalty of perjury, under the laws of the United States, that the foregoing is true and correct.

Executed: (Date illegible)

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David H. Goodwin

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FILED  
CLERK, U.S. DISTRICT COURT  
OCTOBER 24, 1995  
CENTRAL DISTRICT OF CALIFORNIA  
BY DEPUTY

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

LEE ROBBINS,	)	No. CV 94-1157-GHK
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
GEORGE SMITH, WARDEN, et al.	)	
	)	
Respondents.	)	

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Pursuant to the Memorandum and Order of the court, IT IS HEREBY ADJUDGED as follows:

- (1) the petition for writ of habeas corpus is GRANTED, to the extent that petitioner shall be discharged from custody on the subject conviction unless the California Court of Appeal accepts jurisdiction over petitioner's direct appeal within thirty (30) days; and
- (2) respondents shall notify the California Court of Appeal of this court's order.

DATED: This 24th day of October, 1995.

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GEORGE H. KING  
United States District Judge

FILED  
CLERK, U.S. DISTRICT COURT  
OCTOBER 24, 1995  
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

LEE ROBBINS,	)	NO. CV 94-1157-GHK
	)	
Petitioner,	)	
	)	MEMORANDUM AND
	)	ORDER
vs.	)	
	)	
GEORGE SMITH, WARDEN,	)	
et al.	)	
	)	
Respondents.	)	
<hr style="width: 20%; margin-left: 0;"/>		

Petitioner, a state prisoner, was convicted of second degree murder and grand theft auto. On February 24, 1994, he filed a petition for writ of habeas corpus with this court. We appointed counsel to represent petitioner, ordered supplemental briefing, and held oral argument on May 9, 1995.

Although petitioner asserts several claims, we reach only the claim of ineffective assistance of appellate counsel. Because we grant this petition on that ground, and this matter is returned to the state courts with instructions that petitioner be granted a direct appeal with new appellate counsel, we do not reach the merits of any of the other alleged errors, even though petitioner has exhausted his state remedies as to those other contentions. See Sherwood v. Tomkins, 716

F.2d 632, 634 (9th Cir. 1983) (potential reversal of petitioner's conviction on state appeal moots federal claim renders petition premature and subject to dismissal for failure to exhaust state remedies).

### DISCUSSION

Petitioner claims he was denied effective assistance of counsel because his appellate attorney did not prepare a proper appellate brief. (Pet., Mem. at 82-88; Traverse at 5-55). Petitioner's attorney submitted a "Wende" brief in which he summarized the facts of the case, but did not raise any specific issues. See People v. Wende, 25 Cal. 3d 436, 436, 158 Cal. Rptr. 839 (1979). Further, the attorney asked the California Court of Appeal to independently review the record. The attorney did not withdraw from the case, but informed the court that he remained available to brief any issue upon invitation of the court. (Traverse, ex. T-4).

Thereafter, the California Court of Appeal ordered petitioner to raise any appealable issues in his own brief. (Return, ex. 3 at 62). Petitioner filed a document claiming that the evidence was insufficient to support his conviction and that the prosecution had suppressed exculpatory evidence. Id. The Court of Appeal reviewed the record, found no arguable issues, and affirmed the judgment. Id.

In Anders v. California, 386 U.S. 738, 738 (1967), the Supreme Court considered the scope of appellate counsel's duty under the Sixth Amendment when such counsel determines that an appeal is without merit. The Court held that if the attorney believes the appeal is frivolous, he or she may request to withdraw. Id. at 744. The request, however, must be accompanied by a brief referring to anything in the record that might arguably support an appeal. Id.

The Anders requirements are designed to assure that a defendant's right to counsel are not violated. McCoy v. Court of Appeals, 486 U.S. 429, 442 (1988). The reviewing court must satisfy itself that the attorney diligently and thoroughly searched the record for arguable claims, and then must determine whether the attorney correctly concluded that the appeal lacked merit. Penson v. Ohio, 488 U.S. 75, 81-82 (1988); McCoy, 486 U.S. at 442. In the Ninth Circuit, a proper Anders brief should identify the arguable issues and include a legal and factual analysis, rather than a simple recitation of the facts. See United States v. Griffy, 895 F.2d 561, 563 (9th Cir. 1990). If arguable issues exist, failure to present them to the court in counsel's brief violates the constitutional requirements of Anders. See id. at 562. Indeed, at oral argument held on May 9, 1995, respondents conceded that if any arguable issues existed which could have and should have been, but were not, raised, there are "serious problems" and prejudice is presumed.<sup>1/</sup> Because we find there are arguable issues which counsel failed to raise and brief, we conclude that petitioner's appellate counsel was ineffective due to his failure to meet the Anders standards.<sup>2/</sup>

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1. Respondents, of course, contend no arguable issues exist in this case.

2. The court further finds that respondents' argument under Teague v. Lane, 489 U.S. 288 (1989), is without merit. Teague holds that a new rule of criminal procedure cannot be retroactively applied in a habeas proceeding, unless the new rule falls into one of two narrow exceptions. Teague does not apply to new substantive rules. Chambers v. United States, 22 F.3d 939, 942-43 (9th Cir. 1994), vacated on other grounds, 47 F.3d 1015 (9th Cir. 1995).

"A new rule for Teague purposes is one where the result was not dictated . . . at the time the defendant's conviction became final . . . . The question is whether a state court considering the defendant's claim at the time his conviction became final would have

We recognize that the California Court of Appeal reviewed the record and found no issues of merit. We, however, are not bound by that determination. The existence or absence of non-frivolous issues on the record is a mixed question of law and fact which is reviewed de novo on a petition for writ of habeas corpus. See Sumner v. Mata, 455 U.S. 591, 597-98 (1982), vacated on other grounds, 464 U.S. 957 (1983). More importantly, our disagreement with the California Court of Appeal is not disrespectful because that court's determination was hampered by the inadequate brief prepared by counsel. Indeed, the reasoning behind the Anders rule is to ensure that counsel actually conducted a thorough review of the record. But, the California Court of Appeal was denied the opportunity to make such a determination with the aid of ready references to the record and legal authorities cited by counsel. Therefore, we review the record de novo for arguable issues.

An appeal as a matter of law is frivolous where none of the legal points are arguable on their merits. Neitzke v. Williams, 490 U.S. 319, 325 (1989) (citing Anders v. California, 386 U.S. 738, 744 (1967)). The parties are not in disagreement that for present purposes we can use the standard of an "arguable" issue as set forth in People v. Johnson, 123 Cal. App. 3d 106, 111-12, 176 Cal. Rptr. 390 (1981), cert. denied, 457 U.S.

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felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution." Goeke v. Branch, 115 S. Ct. 1275, 1277 (1995) [internal quotations and citations omitted].

In the instant case, the rule being applied in petitioner's case is substantive, not procedural. Even if the issue is deemed to be procedural, Anders clearly sets forth what appellate counsel and the appellate court must do. Further, this court is only applying the settled law of Anders, not an extension or modification thereof, and the standards therein as required before petitioner's state conviction became final.



1108 (1982). To be "arguable," an issue must be one which, in counsel's professional opinion, is meritorious.<sup>3</sup> *Id.*, 123 Cal. App. 3d at 109, 176 Cal. Rptr. at 391. Also, if the issue is successful on appeal and is resolved favorably to the appellant, the result must reverse or modify the judgment.<sup>4</sup> *Id.*

We need not identify each issue that might be arguable. Nor do we mean to suggest that only the issues discussed below are arguable. But, for present purposes, to see whether *Anders* was violated and prejudice presumed, we discuss only the following two examples which should have been, but were not, presented in petitioner's appellate brief. Moreover, we do not purport to resolve the merits of any of these issues nor intimate that they will necessarily result in success on appeal, as that is not the appropriate standard of review on this habeas petition.

### I. Adequacy of the Law Library

The right guaranteed by the Fourteenth and Sixth Amendments to waive one's right to counsel and proceed in pro per "is premised upon the right of the defendant to make a defense." *Milton v. Morris*, 767

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3. Although respondents say there is no such thing as an arguable but non-meritorious claim, we find it is essentially a matter of semantics. Viewing an issue from counsel's ability to argue it in good faith with some potential for prevailing is not to say that it will necessarily achieve success. No one is suggesting that only issues which ultimately prevail are arguable. Rather, all that is required is that an issue has a reasonable potential for success.

4. Because we do not purport to decide the merits of any arguable issues, we also defer to the state appellate court to decide the merits of this second prong. We are satisfied for present purposes that at least some of the arguable issues, if they were decided in petitioner's favor, would have the effect of ultimately affecting the result of his appeal.

F.2d 1443, 1445-46 (9th Cir. 1985) (citing *Faretta v. California*, 422 U.S. 806, 819-20 (1975)). An incarcerated defendant cannot meaningfully exercise this right without access to tools such as law books. *Id.* at 1446; *Taylor v. List*, 880 F.2d (sic) 1040, 1047 (9th Cir. 1989) (same).

The state trial judge was aware of the problems that petitioner was going to encounter with the law library. Indeed, the court warned petitioner, "if you are looking up law, you are not going to be able to find it because somebody has torn it out before you got there." (Aug. RT 19).<sup>5</sup> The court further told petitioner, "it's going to be a real mess for you. You are going to regret this for a long time . . . [because of] your fellow prisoners down in the county jail who have virtually destroyed the law library." (Aug. RT 20). Moreover, the court commented, "it's almost impossible as a pro per to prepare yourself a descent [sic] defense, especially given the law library." (Aug. RT 21).

It is true that the court may not have known exactly what materials petitioner would search out in the law library. In murder cases, however, there are common issues that a defendant will need to research, and by exercising his right to proceed in pro per, petitioner was not required to subject himself to the possibility that, through circumstances wholly beyond his control, he would be unable to prepare his defense. *Milton*, 767 F.2d at 1445.

Given this state of the record, we conclude that petitioner's inability to prepare an adequate defense was at least an arguable issue. Moreover, the "brief" filed by petitioner's appellate counsel did not

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5. "RT" refers to the Reporter's Transcript.



even mention these circumstances in the purported recitation of the facts.<sup>6</sup>

## II. Counsel

### A. Advisory Counsel

Petitioner claims that he attempted to withdraw his waiver of counsel and request advisory counsel, or in the alternative, counsel. (Pet., Mem. at 38, 41).

On August 9, 1990, petitioner stated to the court, "I would like to have the assistance of counsel at the trial. I am not real good at public speaking. I am doing okay as far as the law work and stuff. Obviously, I am not a lawyer, but I need somebody to help me present the case." (Pet., ex. E, transcript dated Aug. 9, 1990, at 23). He further stated, "I do need some help presenting the evidence at the trial. I know the court is aware of the recent case laws in reference to appointing co-counsel and advisory counsel, so I don't need to quote that to the court; but I am asking for the assistance of counsel to help me present my defense." Id. at 24.

Prior to the August 9th hearing, petitioner had requested advisory counsel three times. (Aug. RT 18-20, 24-25; Pet., ex. E, transcript dated April 16, 1990, at 3-4, transcript dated July 13, 1990, at 6). The court denied these requests. (Aug. RT at 23-25; Pet., ex. E, transcript dated April 16, 1990, at 3, transcript dated July 13, 1990, at 6).

From the record, some of petitioner's request (sic) for advisory counsel may be considered ambiguous.

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6. Even if appellate counsel thought this argument and appeal were without merit, he still had a duty under Anders to advise the court of anything in the record which might arguably support the appeal.

It does not appear, however, that the judge attempted to clarify these requests. We recognize that petitioner does not have a constitutional right to advisory counsel. United States v. Kienenberger, 13 F.3d 1354, 1356 (9th Cir. 1994). Petitioner, however, does have the right to a considered exercise of judicial discretion. People v. Bigelow, 37 Cal. 3d 731, 742, 209 Cal. Rptr. 328, 333-34 (1984) (citing People v. Mattson, 51 Cal. 2d 777, 797, 336 P.2d 937 (1959) (the appointment of advisory counsel is within the sound discretion of the trial judge who is in the best position to appraise the situation)).

On these facts, it is unclear whether the judge focused on the proper legal standard. At the hearing held on January 24, 1990, the court responded to petitioner's request for advisory counsel by stating, "[t]he problem is you either get to go pro per or you have a lawyer." (Aug. RT 19). This is an apparent error of law. There would never be advisory counsel if a defendant could only proceed pro per or with a lawyer. Indeed, California courts frequently exercise their discretion to appoint advisory counsel. Bigelow, 37 Cal. 3d at 742, 209 Cal. Rptr. at 334. The trial judge, therefore, was at least required to exercise his discretion, especially given that petitioner was charged with murder.

### B. Primary Counsel

Moreover, it is also arguable that petitioner was also requesting primary counsel. Fairly read, petitioner asked for the appointment of counsel as an alternative to advisory counsel. See United States v. Robinson, 913 F.2d 712, 718 (9th Cir. 1990), cert. denied, 498 U.S. 1104 (1991) (Sixth Amendment rights attach at critical stages, such as a motion for new trial or sentencing, even though a defendant had previously waived his right to counsel and represented himself at

trial); Menefield v. Borg, 881 F.2d 696, 698 (9th Cir. 1989) (same). Because the judge failed to even consider whether petitioner was reasserting his right to counsel, it, too, is a non-frivolous issue which should have been raised by petitioner's appellate counsel.<sup>7</sup>

### CONCLUSION

IT IS ADJUDGED that the petition for writ of habeas corpus is GRANTED, to the extent that petitioner shall be discharged from custody on the subject conviction unless the California Court of Appeal accepts jurisdiction over petitioner's direct appeal within 30 days; respondents shall notify the California Court of Appeal of this court's order.

Dated: This 24th day of October, 1995

GEORGE H. KING  
United States District Judge

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7. We reiterate that it is unnecessary for us to inquire into further violations of Anders because, as respondents concede, if there are any arguable issues, prejudice is presumed.

FILED  
CLERK, U.S. DISTRICT COURT  
NOVEMBER 1, 1995  
CENTRAL DISTRICT OF CALIFORNIA  
BY DEPUTY

ENTERED  
CLERK, U.S. DISTRICT COURT  
NOVEMBER 9, 1995  
CENTRAL DISTRICT OF CALIFORNIA  
BY DEPUTY

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Jesus F. Marroquin,	)	
	)	CV 95-2477-KN (SH)
Petitioner,	)	
	)	ORDER Re: Habeas Corpus
	)	Petition
v.	)	
	)	
K.W. Prunty, Warden,	)	
	)	
Respondent.	)	
	)	

Pursuant to 28 U.S.C. § 636(b)(1)(C), the Court has reviewed the Final Report and Recommendation of the United States Magistrate Judge. The Court declines to follow the recommendations of the Magistrate Judge and hereby **DENIES** the Petition.

Petitioner alleges that the California Court of Appeal's failure to request further briefing from his appellate counsel and its denial of his request for new counsel to brief his appellate issues prior to ruling on the merits violated his Sixth and Fourteenth Amendment right to counsel. The United States Supreme Court in Penson

v. Ohio, 488 U.S. 75, 80 (1988) held that if there are nonfrivolous issues on appeal, the appellate court "must, prior to the decision, afford the indigent the assistance of counsel to argue the appeal." In California, appellate counsel for an indigent may file a brief containing only a statement of the facts and the applicable law if counsel believes that there are no meritorious issues on appeal. People v. Feggans, 67 Cal.2d 444 (1964). If appellate counsel files such a brief, the appellate court "must then itself conduct a full examination of all the proceedings to decide whether the case is wholly frivolous . . . . [O]nly after the appellate court finds no nonfrivolous issues for appeal, may the court proceed to consider the appeal on the merits without the assistance of counsel." Penson, supra, at 80 (internal quotations and brackets omitted).

In the instant case, Petitioner was appointed appellate counsel. Counsel filed a "no-merit brief" pursuant to Feggans, having determined that there were no meritorious issues on appeal. The California Court of Appeal then made its own independent determination that the appeal was frivolous. The Court of Appeal in its opinion did address the merits of one issue: the trial court's denial of Petitioner's motion to exclude evidence of a prior felony conviction. However, although the appellate court addressed the merits of this issue (and determined that it was proper to admit such evidence), the court carefully pointed out that a "review of the record reveals that, despite extensive argument on the subject and the trial court's denial of the motion to exclude, the prosecutor never introduced the conviction into evidence." Thus, while the admission of the prior felony conviction would have been an arguable issue on appeal, the fact that the conviction was never admitted rendered the issue moot. The court went on to state that "Defendant's other contentions are equally unsupported by the record" and "no arguable issues exist."

Having conducted its own independent review of the record and determined that all issues raised on appeal were frivolous, the Court of Appeals had no obligation to either request further briefing from Petitioner's appellate counsel, or appoint new appellate counsel for Petitioner to brief the issues on appeal prior to ruling on the merits of Petitioner's appeal. The Court of Appeals fully complied with the requirements of Penson v. Ohio.

Petitioner's assertion that he was denied the assistance of appellate counsel in violation of the Sixth and Fourteenth Amendment has no merit, as Petitioner failed to raise any non-frivolous issues on appeal. The Court therefore **DENIES** the Petition for a Writ of Habeas Corpus.

IT IS SO ORDERED.

DATED: \_\_\_\_\_

\_\_\_\_\_  
DAVID V. KENYON  
UNITED STATES DISTRICT JUDGE



FOR PUBLICATIONS  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

LEE ROBBINS,	)	
	)	No. 95-56640
Petitioner-Appellee,	)	
	)	D.C. No.
v.	)	CV-94-01157-GHK
	)	
GEORGE SMITH, Warden,	)	
CALIFORNIA DEPARTMENT	)	
OF CORRECTIONS,	)	
Respondent-Appellant.	)	

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LEE ROBBINS,	)	
	)	No. 96-55063
Petitioner-Appellant,	)	
	)	D.C. No.
v.	)	CV-94-01157-GHK
	)	
GEORGE SMITH,	)	OPINION
	)	
Respondent-Appellee.	)	

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Appeals from the United States District Court  
for the Central District of California  
George H. King, District Judge, Presiding

Argued and Submitted  
October 8, 1996-Pasadena, California

Filed September 23, 1997

Before: Proctor Hug, Jr., Chief Judge,  
Harry Pregerson and Stephen Reinhardt, Circuit Judges.  
Opinion by Chief Judge Hug



## ROBBINS v. SMITH

## SUMMARY

## Criminal Law and Procedure/Habeas

The court of appeals affirmed in part a judgment of the district court and remanded. The court held that district courts must rule on all claims raised in a petition for habeas corpus, even if the petition is granted on one claim to avoid injustice to a petitioner potentially deserving a retrial and possibly an acquittal.

Appellee Lee Robbins represented himself at trial and was convicted of second-degree murder and grand theft auto. Appointed counsel for his state appeal filed a no-merit brief which failed to present any possible grounds for appeal. The brief included a request that the court review the record for arguable issues. Robbins filed a brief on his own behalf.

The state court of appeals denied Robbins's appeal. His petition for review by the state supreme court was also denied.

Robbins filed a federal habeas corpus petition, alleging that his appointed state appellate counsel failed to present his claims in accordance with *Anders v. California*, 386 U.S. 738 (1967). He also raised numerous trial errors.

The district court granted a conditional writ of habeas corpus, finding that at least two non-frivolous issues existed for appeal: (1) the trial court erred in failing to allow Robbins to withdraw the waiver of his right to counsel; and (2) the court failed to provide him with

## ROBBINS v. SMITH

either the money or the means to prepare his own defense.

The government appealed, arguing that appointed counsel's actions satisfied the requirement of *Anders*; the district court erred in basing its grant of Robbins's petition on the finding that at least two arguable issues existed for appeal; and the application of *Anders* violated *Teague v. Lane*, 489 U.S. 288 (1989).

Robbins cross-appealed, arguing that the district court should have granted relief on his claims of constitutional error in the trial, entitling him to a new trial.

[1] The provisions of the Antiterrorism and Effective Death Penalty Act were not applicable because Robbins filed his petition prior to the Act's effective date.

[2] *Anders* is the Supreme Court's landmark pronouncement setting forth court-appointed appellate counsel's duty to further a client's case after determining the appeal to be without merit. [3] The Fourteenth Amendment does not demand that appointed counsel pursue wholly frivolous appeals; however, under *Anders*, appointed counsel must either provide active and vigorous appellate representation of indigent criminal defendants or, after conducting a conscientious examination of the record and concluding that any appeal would be wholly frivolous, request leave to withdraw and file a brief identifying anything in the record that might arguably support an appeal.

[4] Robbins's appointed counsel neither provided active and vigorous appellate representation, nor complied with *Anders*.

## ROBBINS v. SMITH

[5] *Anders* creates a very low threshold for which arguments counsel must brief for the court. Counsel must bring to the court's attention anything in the record that might arguably support the appeal. [6] The two issues identified by the district court were arguably non-frivolous and should have caused the state to appoint new counsel for Robbins.

[7] In *Teague*, the Supreme Court held that new constitutional rules cannot be applied retroactively to cases on collateral review unless they fall into one of two narrow exceptions. A case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final.

[8] The district court's holding did not involve a new rule. The outcome of Robbins's case was predetermined by the Supreme Court's analysis in *Anders*, which was handed down before Robbins's conviction.

[9] Had Robbins not raised the *Anders* issue, the district court would have reached the merits of Robbins's claims of constitutional error at trial. Had the district court ruled in Robbins's favor on them, a grant of habeas relief would have required either release or a new trial.

[10] The district courts have been directed to rule on all claims raised in a petition for habeas corpus, even if the petition is granted on one. [11] Granting the writ only for the ineffective assistance of counsel on appeal leaves the challenges underlying the conviction unresolved. This can cause grave injustices to defendants who must await resolution of a renewed appeal while potentially deserving a retrial and possibly an acquittal. [12] Remand was

## ROBBINS v. SMITH

required for the district court to consider Robbins's claims of constitutional error at trial.

## COUNSEL

Carol Frederick Jorstad, Deputy Attorney General, Los Angeles, California, for the respondent-appellant-appellee.

Elizabeth A. Newman and Ronald J. Nessim, Bird, Marella, Boxer, Wolpert & Matz, Los Angeles, California, for the petitioner-appellee-appellant.

## OPINION

HUG, Chief Judge:

Robbins was convicted in California state court of second-degree murder and grand theft auto. His petition for habeas corpus alleges that his rights under the United States Constitution were violated because of constitutional errors in his trial and also because of ineffective assistance of counsel in his direct appeal. The district court held that Robbins was denied effective assistance of counsel on appeal because of the failure of his appointed counsel to comply with the minimum requirements of *Anders v. California*, 386 U.S. 738 (1967). The district court did not reach the exhausted issues set forth in Robbins' petition concerning the alleged violation of his constitutional rights at the trial stage. The district court's order would only require that Robbins be afforded an opportunity to appeal his conviction with the aid of effective counsel.



## ROBBINS v. SMITH

We have jurisdiction pursuant to 28 U.S.C. §2253 and we affirm the district court's granting of Robbins's habeas petition on the *Anders* issue. We remand, however, to the district court for consideration of the alleged constitutional violations at trial that have been properly exhausted in the state courts. We hold that Robbins is entitled to consideration of these issues at this time. If the petition is granted on any of those grounds, it would obviate the necessity for an appeal. If the petition is denied on those grounds, the new appeal in the state court as required by the district court order would, of course, not be confined to exhausted issues, but would be a renewed direct appeal.

## I. FACTS AND PRIOR PROCEEDINGS

Lee Robbins, an indigent defendant, represented himself at trial, where he was convicted of second-degree murder and grand theft auto. He was sentenced to seventeen years to life in the California state prison on September 5, 1990.

Robbins received appointed counsel for his state appeal. His attorney filed a no-merit brief before the court, which briefly outlined the facts surrounding Robbins's trial and failed to present any possible grounds for appeal. Included in the short document was a request that the court itself review the record for arguable issues. Counsel pledged to remain "available to brief any [issue(s)] upon invitation of the court."

Robbins subsequently filed a brief on his own behalf. After the California Court of Appeals found Robbins's claims to be unsupported by the record and that no other arguable issues existed, his appeal was denied on December 12, 1991. Robbins's petition for review by the

## ROBBINS v. SMITH

California Supreme Court was denied on October 21 of the following year.

After exhausting his state remedies on January 26, 1994,<sup>17</sup> Robbins filed, pursuant to 28 U.S.C. §2254, an amended first federal habeas petition on February 24, 1994. He argued that his appointed state appellate counsel failed to present his claims in accordance with *Anders v. California*, 386 U.S. 738 (1967). He also raised numerous trial errors, among them: (1) that the prosecutor had violated his duty to disclose exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963); (2) that the court had erred in failing to allow Robbins to withdraw the waiver of his right to counsel; (3) that the court had failed to provide him with either the money or the means to prepare a case in his own defense; and (4) that the court had deprived him of his right to a fair trial by failing to secure the presence of the witnesses he had subpoenaed.

After counsel was appointed to represent Robbins, and after several rounds of supplemental briefing, the district court granted his habeas petition on October 24, 1995, "to the extent that petitioner shall be discharged from custody unless the California Court of Appeal accepts jurisdiction over petitioner's direct appeal within 30 days." The State of California appealed. Robbins cross-appealed, arguing that the district court should have

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1. Robbins filed a habeas petition in state court, which the California Supreme Court ultimately denied on the merits. The petition raised the same issues Robbins now raises in his federal habeas petition.

## ROBBINS v. SMITH

granted relief on his claims of constitutional error in the trial, thereby entitling him to a new trial.

II. *Applicability Of AEDPA*

[1] As a threshold matter, we must decide whether the new substantive and procedural requirements of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), signed into law on April 24, 1996, are applicable to this case. Though the answer to the question was not clear at the time of oral argument, the Supreme Court has since held that the sections of AEDPA relevant to this case do not apply to cases filed in the federal courts prior to the Act's effective date of April 24, 1996. See *Lindh v. Murphy*, 117 S. Ct. 2059, 2068 (1997); see also *Jeffries v. Wood*, 103 F.3d 827, 827 (9th Cir. 1996). Robbins filed his § 2254 petition in the district court in February 1994. Thus, the provisions of AEDPA do not apply to this petition.

III. *The State's Appeal*

The district court held that Robbins's representation during his direct appeal was ineffective under *Anders v. California*, 386 U.S. 738 (1967). It was on this basis that the district court granted a conditional writ of habeas corpus. The State appeals that order, arguing (1) that the brief filed by Robbins's appointed counsel complied with *Anders* as interpreted by the California Supreme Court, (2) that the district court erred in finding that arguably nonfrivolous issues existed, and (3) that the application of *Anders* violates *Teague v. Lane*, 489 U.S. 288 (1989). We address each of these arguments below.

## ROBBINS v. SMITH

[2] *Anders* is the Supreme Court's landmark pronouncement setting forth court-appointed appellate counsel's duty to further a client's case after determining the appeal to be without merit. *Anders* involved the situation where an indigent defendant's appointed counsel, after concluding an appeal was frivolous, filed a letter brief so informing the court. The letter noted that counsel remained at the court's disposal to brief any issues that the court were to see fit. The defendant's request for replacement counsel was denied, and the California Court of Appeals affirmed the conviction.

*Anders* subsequently filed a federal habeas petition, arguing that his right to effective counsel on appeal had been violated. The Supreme Court agreed. The Court was convinced that the appellate court reviewed *Ander's* claim without the benefit of briefing or advocacy based on "counsel's bare conclusion" that the appeal was frivolous. *Anders*, 386 U.S. at 742. The Court held that such a letter brief from defendant's counsel "cannot be an adequate substitute for the right to full appellate review." *Id.* (quoting *Eskridge v. Washington State Bd.*, 357 U.S. 214, 215 (1958)).

[3] In *Penson v. Ohio*, the Supreme Court explained that "*Andres*, in essence, recognizes a limited exception to the requirement articulated in [*Douglas v. California*, 372 U.S. 353 (1963)] that indigent defendants receive representation on their first appeal as of right." *Penson v. Ohio*, 488 U.S. 75, 83 (1988). This limited exception recognizes that the Fourteenth Amendment does not demand that a State require that appointed counsel pursue wholly frivolous appeals. *Id.* at 83-84. *Anders* and *Douglas* thus set forth the exclusive procedure through which appointed counsel's performance can pass



## ROBBINS v. SMITH

constitutional muster: Appointed counsel must either provide active and vigorous appellate representation of indigent criminal defendants or, after conducting a conscientious examination of the record and concluding that any appeal would be wholly frivolous, request leave to withdraw and file a brief identifying anything in the record that might arguably support an appeal. See *Anders*, 386 U.S. at 744; see also *Penson*, 488 U.S. at 80, 83-84.

The California Supreme Court interpreted *Anders* in *People v. Feggans*, 67 Cal. 2d 444, 432 P.2d 21 (1967), and later in *People v. Wende*, 25 Cal. 3d 436, 600 P.2d 1071 (1979). The State contends that, because Robbins's state appellate counsel's brief complies with the strictures of *Wende*, the district court erred in determining the brief to be insufficient under *Anders*. The State argues that appointed counsel's actions in this case satisfy the requirements of *Anders*, as construed by *Feggans* and *Wende*, because: (1) the nonexistence of arguable issues should have been inferred from counsel's failure to raise any; and (2) despite the fact that it should have been inferred that counsel concluded that there was a lack of arguable issues, it was not incumbent on him to withdraw because he had not "disabled himself from effectively representing" Robbins by describing his case as frivolous. See *Wende*, 600 P.2d at 1075.

[4] Accepting the State's contention, that the state court decision in *Wende* allows a departure from the strict requirements of *Anders*, would override Supreme Court precedent. Our obligation in this habeas action is to determine whether appellate counsel met his obligations under the United States Supreme Court's requirements set forth in *Anders* and its progeny. It is apparent that those requirements were not met. Robbins's appointed counsel

## ROBBINS v. SMITH

neither provided active and vigorous appellate representation nor complied with *Anders*. The brief filed on Robbins's behalf completely failed to identify any grounds that arguably supported an appeal. Rather, it briefly summarized the procedural and historical facts of the case and requested that the state appellate court "independently review the entire record for arguable issues." Accordingly, the district court correctly found that Robbins's counsel did not comply with *Anders*.

The State also argues that the district court erred in basing its grant of Robbins's petition on the finding that at least two arguable issues existed for appeal. In making this argument, the State assumes that the nonexistence of arguable issues would render appointed counsel's failure to comply with *Anders* harmless. We need not decide whether this assumption is correct because we conclude that the district court correctly determined that arguably nonfrivolous issues existed.

The district court found that at least two nonfrivolous appellate issues existed in Robbins's case: (1) that the denial of Robbins's attempt to withdraw the waiver of his right to counsel constituted error; and (2) that the inadequacy of the county jail's library deprived him of a meaningful opportunity to prepare his defense. It further noted that there may well be other arguable issues. Robbins also points to several other exhausted, arguably nonfrivolous appellate issues, including prosecutorial misconduct in violation of *Brady v. Maryland*, wrongful denial of Robbins's *Marsden* motions (motions under California law relating to the substitution of counsel), and interference with Robbins's constitutional right to prepare an adequate defense on his own behalf.

## ROBBINS v. SMITH

[5] *Anders* creates a very low threshold for which arguments counsel must brief for the court. See *United States v. Griffy*, 895 F.2d 561, 563 (9th Cir. 1990); *Lombard v. Lynaugh*, 868 F.2d 1475, 1487 (5th Cir. 1989) (Goldberg, J., concurring). Certainly, counsel need not argue only "winning" arguments. Instead, counsel must bring to the court's attention "anything in the record that might arguably support the appeal." *Anders*, 386, U.S. at 744. For purposes of California law, an issue is "arguable" when it has some potential for success, meaning some possibility of a result requiring reversal or modification of the judgment. *People v. Johnson*, 123 Cal. App. 3d 106, 109 (1981).

[6] The two issues identified by the district court --- (1) whether the denial of Robbins's attempt to withdraw the waiver of his right to counsel constituted error; and (2) whether the inadequacy of the county jails library deprived him of a meaningful opportunity to prepare his defense --- are arguably nonfrivolous and should have caused the state appellate court to appoint new counsel for Robbins.<sup>2</sup> As noted by the district court:

The right guaranteed by the Fourteenth and Sixth Amendments to waive one's right to counsel and proceed in pro per "is premised upon the right of the defendant to make a defense." *Milton v. Morris*, 767 F.2d 1443, 1445-46 (9th Cir. 1985) (citing *Faretta v. California*, 422 U.S. 806, 819-20 (1975)). An incarcerated

2. Because we conclude that the district court correctly identified at least two arguably nonfrivolous issues, we need not determine whether arguably nonfrivolous issues exist.

## ROBBINS v. SMITH

defendant cannot meaningfully exercise this right without access to tools such as law books. *Id.* at 1446; *Taylor v. List*, 880 F.2d 1040, 1047 (9th Cir. 1989).

The California trial judge's own words ---- "it's almost impossible as a pro per to prepare yourself a decent defense, especially given the law library" --- justify the district court's conclusion that Robbins's inability to prepare an adequate defense was, in the very least, an arguable issue. The California trial judge even told Robbins that "if you are looking up law, you are not going to be able to find it because somebody has torn it out before you got there." There is some potential, had Robbins's appointed counsel raised and vigorously advanced this issue on appeal, that Robbins's conviction would have been reversed.

As the district court noted, the California trial court's treatment of Robbins's request to withdraw his waiver of his right to counsel also raises a serious constitutional question. The district court stated, "[f]airly read, petitioner asked for the appointment of counsel as an alternative to advisory counsel. Because the judge failed to even consider whether petitioner was reasserting his right to counsel, it too is a nonfrivolous issue which should have been raised by petitioner's appellate counsel." We agree.

[7] Finally, the State argues that granting relief on Robbins's *Anders* claim violates *Teague v. Lane*. *Teague* held that new constitutional rules cannot be applied retroactively to cases on collateral review unless they fall into one of two narrow exceptions. "[A] case announces a new rule if the result was not *dictated* by precedent



## ROBBINS v. SMITH

existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301. Therefore, we must determine, "whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution." *Goeke v. Branch*, 514 U.S. 115, 118 (1995) (quoting *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994)).

[8] It is clear that the district court's holding in this case did not involve a new rule. Our discussion above indicates that the outcome of Robbins's case was predetermined by the controlling analysis provided by the Supreme Court in *Anders* and *Penson*, both of which were handed down before Robbins's conviction. The consequences of counsel's failure to raise arguable issues were unambiguously detailed in *Anders*. Application of *Anders* to this case required no extension of precedent or logical interpolation. The facts of Robbins's case almost directly mirrors those of *Anders*. In light of these considerations, the *Goeke* test confirms that no "new" constitutional rule was invoked in this case.

## IV. Robbins's Cross-Appeal

Robbins argues in his cross-appeal that the district court erred when it failed to consider and to rule upon his allegations of constitutional error in the state court trial.

[9] Robbins brought eleven exhausted claims in the district court relating to his trial. Had Robbins not raised the *Anders* issue, the district court would have reached the merits of those claims. Had the district court ruled in Robbins's favor on them, a grant of habeas relief would have required either release or a new trial. The need for

## ROBBINS v. SMITH

a new direct appeal --- the remedy granted by the district court --- would be obviated by this outcome. Robbins is entitled to have these foundational claims in his habeas petition considered first.

[10] The Eleventh Circuit has, in the exercise of its supervisory authority, directed district courts to rule on all claims raised in a petition for habeas corpus, even if the petition is granted on one claim. *Clisby v. Jones*, 960 F.2d 925, 936 (11th Cir. 1992) (en banc). This has the advantage of avoiding possible remands for consideration of remaining claims if the district court's decision on one claim is reversed. It has the disadvantage of requiring considerable extra work by the district court to decide many claims that may be completely unnecessary, because they will be mooted on appeal.

[11] We have taken a different approach in our circuit. In *Blazak v. Ricketts*, 971 F.2d 1408, 1413 (9th Cir. 1992) (per curiam), we declined to apply the *Clisby* approach to a capital case in which the district court granted the writ on one guilt phase issue without deciding all the remaining guilt phase issues or any of the penalty phase issues. We drew a distinction, however, between a case which granted a petition on a sentencing issue but left unresolved an issue affecting the validity of the conviction. *Id.* at 1413-14. We stated:

Moreover, unlike habeas grants exclusively on sentencing issues, the grant of a habeas petition because of the constitutional invalidity of a conviction raises concerns that a possibly innocent person has been unjustifiably incarcerated on death row for a number of years. Delaying retrial in such cases, while



## ROBBINS v. SMITH

attorneys fight over a sentence that may no longer exist, risks the perpetuation of a monumental injustice, should retrial ultimately result in an acquittal.

*Id.* at 1414 n.7; *see also Rice v. Wood*, 44 F.3d 1396, 1402 n.10 (9th Cir. 1995). The same policy considerations are involved in this case. Granting the writ only for the ineffective assistance of counsel on appeal leaves the challenges underlying the conviction unresolved. Resolving other issues while leaving challenges to the underlying conviction unresolved potentially can cause grave injustice to defendants like Robbins who, despite alleging constitutional shortcomings in the trial process, must await resolution of a renewed appeal while potentially deserving a retrial and possibly an acquittal.

*Penson v. Ohio*, cited by California in opposition to Robbins's claim, is inapposite. *Penson* was an indigent defendant who was convicted of several serious felonies. His appointed appellate counsel filed a letter brief certifying his appeal to be meritless and asking to withdraw. In violation of *Anders*, the Ohio Court of Appeals allowed counsel to withdraw and conducted its own review of the record without the benefit of advocacy or briefing. *Penson*, 488 U.S. at 78. The Ohio Court found "several arguable claims," reversed one of his convictions, and then dismissed his appeal. *Id.* at 79. *Penson* petitioned for a writ of certiorari. The Supreme Court granted the petition and reversed.

[12] *Penson* is unlike the case at bar because it involved the Supreme Court's review of the Ohio appellate court's dismissal of *Penson's* direct appeal. When the Court recognized that "several arguably

## ROBBINS v. SMITH

meritorious grounds for reversal" existed, it remanded the matter to the Ohio appellate court for further proceedings. *Id.* It was, however, reviewing the direct appeal of a state court action, and not a habeas petition. In this circumstance, the Court explained that it would not "sit in place of the Ohio Court of Appeals in the first instance to determine whether petitioner was prejudiced as to any appellate issue." *Id.* at 87 n.9 (emphasis added). In this habeas proceeding the district court will be considering alleged constitutional errors in the defendant's trial that have been exhausted in the state court. Robbins is entitled to have those trial issues considered at this time just as any other habeas petitioner would. The fact that Robbins also presents an allegation of ineffective assistance of appellate counsel is a secondary issue that comes into play only if the district court denies relief for trial errors. That appeal would then be a renewal of the direct appeal as in *Penson* and could encompass any issues that could have been raised on direct appeal.

Because the district court should have addressed the claims of trial error first, it might not have needed to address Robbins's claims of appellate error as well. Because it did address the appellate claims, however, and because it decided those questions correctly, it is in the interest of judicial economy and efficiency to affirm them now. If trial error is found to have occurred and to require vacation of the conviction, the appellate errors will become immaterial. If no such trial errors are found, however, the district court's original order will again become applicable. *Cf. Penson*, 488 U.S. at 88-89 (the actual or constructive denial of assistance of counsel is presumed to result in prejudice); *Lombard*, 868 F.2d at 1487 (formal physical presence of appellate attorney is not appellate counsel; defendant constructively denied

## ROBBINS v. SMITH

assistance of counsel where attorney filed document containing no arguments going to merits of appeal).

## V. CONCLUSION

The judgment of the district court is **AFFIRMED IN PART** but the case is **REMANDED** to the district court for consideration of whether the alleged constitutional trial errors that defendant raises merit reversal of Robbins's underlying convictions and the granting of a new trial.

FOR PUBLICATION  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

LEE ROBBINS,	)
	) No. 95-56640
Petitioner-Appellee,	)
	) D.C. No.
v.	) CV-94-01157-GHK
	)
GEORGE SMITH, Warden,	)
CALIFORNIA DEPARTMENT	)
OF CORRECTIONS,	)
Respondent-Appellant.	)
	)

LEE ROBBINS,	)
	) No. 96-55063
Petitioner-Appellant,	)
	) D.C. No.
v.	) CV-94-01157-GHK
	)
GEORGE SMITH,	) AMENDED
	) OPINION
Respondent-Appellee.	)
	)

Appeals from the United States District Court  
for the Central District of California  
George H. King, District Judge, Presiding

Argued and Submitted  
October 8, 1996-Pasadena, California

Filed September 23, 1997  
Amended August 13, 1998

Before: Proctor Hug, Jr., Chief Judge,  
Harry Pregerson and Stephen Reinhardt, Circuit Judges.  
Opinion by Chief Judge Hug

## ROBBINS v. SMITH

## SUMMARY

## Criminal Law and Procedure/Habeas

The court of appeals affirmed a judgment of the district court in part. The court held that a district court must rule on all exhausted claims of trial error raised in a habeas corpus petition even if the court grants the petition on a claim of ineffective assistance of appellate counsel.

Appellee Lee Robbins represented himself at trial and was convicted of second-degree murder and grand theft auto. Appointed counsel for his state appeal filed a no-merit brief which failed to present any possible grounds for appeal. The brief included a request that the court review the record for arguable issues. Robbins filed a brief on his own behalf.

The California Court of Appeal affirmed Robbins's conviction. The California Supreme Court denied his petition for review.

Robbins filed a federal corpus petition, alleging that his appointed state appellate counsel failed to present his claims in accordance with *Anders v. California*, 386 U.S. 738 (1967). He also raised numerous trial errors.

The district court granted a conditional writ, concluding that at least two non-frivolous issues existed for appeal: (1) the trial court erred in failing to allow Robbins to withdraw the waiver of his right to counsel; and (2) the court failed to provide him with either the money or the means to prepare his own defense.

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The State appealed, contending that appointed counsel's actions satisfied the requirement of *Anders*; the district court erred in basing its grant of Robbins's petition on the finding that at least two arguable issues existed for appeal; and the application of *Anders* violated *Teague v. Lane*, 489 U.S. 288 (1989).

Robbins cross-appealed, asserting that the district court should have granted relief on his claims of constitutional error in the trial, entitling him to a new trial.

[1] The provisions of the Antiterrorism and Effective Death Penalty Act were not applicable because Robbins filed his petition prior to the Act's effective date.

[2] *Anders* set forth court-appointed appellate counsel's duty to further a client's case after determining the appeal to be without merit. [3] Appointed counsel must either provide active and vigorous appellate representation of indigent criminal defendants or, after conducting a conscientious examination of the record and concluding that any appeal would be wholly frivolous, request leave to withdraw and file a brief identifying anything in the record that might arguably support an appeal.

[4] The obligation of the court of appeals was to determine whether appellate counsel met his obligation under *Anders* and its progeny. Robbins's appointed counsel neither provided active and vigorous appellate representation, nor complied with *Anders*. The brief filed on Robbins's behalf completely failed to identify any grounds that arguably supported an appeal. Accordingly,



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the district court correctly found that Robbins's counsel did not comply with *Anders*.

[5] *Anders* creates a very low threshold for which arguments counsel must brief for the court. Counsel must bring to the court's attention anything in the record that might arguably support the appeal. [6] The two issues identified by the district court were arguable and should have caused the state appellate court to appoint new counsel for Robbins.

[7] *Teague* held that new constitutional rules cannot be applied retroactively to cases on collateral review unless they fall into one of two narrow exceptions. The district court's holding did not involve a new rule. The facts of Robbins's case almost directly mirrored those of *Anders*. Accordingly, no "new" constitutional rule was invoked.

[8] Had Robbins not raised the *Anders* issue, the district court would have reached the merits of Robbins's claims of constitutional error at trial. Had the district court ruled in Robbins's favor on them, a grant of habeas relief would have required either release or a new trial.

[9] The district courts have been directed to rule on claims raised in a petition for habeas corpus, even if the petition is granted on one. [10] Granting the writ only for the effective assistance counsel on appeal leaves the challenges underlying the conviction unresolved. This can cause grave injustices to defendants who must await resolution of a renewed appeal while potentially deserving a retrial and possibly an acquittal. [11] Robbins was

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entitled to have trial issues considered just as any other habeas petitioner would. That Robbins also presented an allegation of ineffective assistance of appellate counsel was a secondary issue that would come into play only if the district court were to deny relief for trial errors. That appeal would be a renewal of the direct appeal, and could encompass any issues that could have been raised on direct appeal.

[12] Because the district court addressed the appellate claims and decided them correctly, it was in the interest of judicial economy and efficiency to affirm them. If trial error were found to have occurred and required vacation of the conviction, the appellate errors would become immaterial. If no such trial errors were found, the district court's original order would again become applicable.

## COUNSEL

Carol Frederick Jorstad, Deputy Attorney General, Los Angeles, California for the respondent-appellant-cross-appellee. Elizabeth A. Newman and Ronald J. Nessim, Bird, Marella, Boxer, Wolpert & Matz, Los Angeles, California, for the petitioner-appellee-cross-appellant.

## OPINION

HUG, Chief Judge:

Robbins was convicted in California state court of second-degree murder and grand theft auto. His petition for habeas corpus alleges that his rights under the United States Constitution were violated because of constitutional errors in his trial and also because of ineffective assistance

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of counsel in his direct appeal. The district court held that Robbins was denied effective assistance of counsel on appeal because of the failure of his appointed counsel to comply with the minimum requirements of *Anders v. California*, 386 U.S. 738 (1967). The district court did not reach the exhausted issues set forth in Robbins' petition concerning the alleged violation of his constitutional rights at the trial stage. The district court's order would only require that Robbins be afforded an opportunity to appeal his conviction with the aid of effective counsel.

We have jurisdiction pursuant to 28 U.S.C. § 2253 and we affirm the district court's granting of Robbins's habeas petition on the *Anders* issue. We remand, however, to the district court for consideration of the alleged constitutional violations at trial that have been properly exhausted in the state courts. We hold that Robbins is entitled to consideration of these issues at this time. If the petition is granted on any of those grounds, it would obviate the necessity for an appeal. If the petition is denied on those grounds, the new appeal in the state court as required by the district court order would, of course, not be confined to exhausted issues, but would be a renewed direct appeal.

## I. FACTS AND PRIOR PROCEEDINGS

Lee Robbins, an indigent defendant, represented himself at trial, where he was convicted of second-degree murder and grand theft auto. He was sentenced to seventeen years to life in the California state prison on September 5, 1990.

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Robbins received appointed counsel for his state appeal. His attorney filed a no-merit brief before the court, which briefly outlined the facts surrounding Robbins's trial and failed to present any possible grounds for appeal. Included in the short document was a request that the court itself review the record for arguable issues. Counsel pledged to remain "available to brief any [issues(s)] upon invitation of the court."

Robbins subsequently filed a brief on his own behalf. After the California Court of Appeals found Robbins's claims to be unsupported by the record and that no other arguable issues existed, his appeal was denied on December 12, 1991. Robbins's petition for review by the California Supreme Court was denied on October 21 of the following year.

After exhausting his state remedies on January 26, 1994,<sup>1</sup> Robbins filed, pursuant to 28 U.S.C. § 2254, an amended first federal petition on February 24, 1994. He argued that his appointed state appellate counsel failed to present his claims in accordance with *Anders v. California*, 386 U.S. 738 (1967). He also raised numerous trial errors, among them: (1) that the prosecutor had violated his duty to disclose exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963); (2) that the court had erred in failing to allow Robbins to withdraw the waiver of his right to counsel; (3) that the court had failed to provide him with either the money or the means to prepare a case in his

1. Robbins filed a habeas petition in state court, which the California Supreme Court ultimately denied on the merits. The petition raised the same issues that Robbins now raises in his federal habeas petition.



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own defense; and (4) that the court had deprived him of his right to a fair trial by failing to secure the presence of the witnesses he had subpoenaed.

After counsel was appointed to represent Robbins, and after several rounds of supplemental briefing, the district court granted his habeas petition on October 24, 1995, "to the extent that petitioner shall be discharged from custody unless the California Court of Appeal accepts jurisdiction over petitioner's direct appeal within 30 days." The State of California appealed. Robbins cross-appealed, arguing that the district court should have granted relief on his claims of constitutional error in the trial, thereby entitling him to a new trial.

## II. Applicability Of AEDPA

[1] As a threshold matter, we must decide whether the new substantive and procedural requirements of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), signed into law on April 24, 1996, are applicable to this case. Though the answer to the question was not clear at the time of oral argument, the Supreme Court has since held that the sections of AEDPA relevant to this case do not apply to cases filed in the federal courts prior to the Act's effective date of April 24, 1996. *See Lindh v. Murphy*, 117 S. Ct. 2059, 2068 (1997); *see also Jeffries v. Wood*, 103 F.3d 827, 827 (9th Cir. 1996). Robbins filed his § 2254 petition in the district court in February 1994. Thus, the provisions of AEDPA do not apply to this petition.

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## III. The State's Appeal

The district court held that Robbins's representation during his direct appeal was ineffective under *Anders v. California*, 386 U.S. 738 (1967). It was on this basis that the district court granted a conditional writ of habeas corpus. The State appeals that order, arguing (1) that the brief filed by Robbins's appointed counsel complied with *Anders* as interpreted by the California Supreme Court. (2) that the district court erred in finding that arguable issues existed, and (3) that the application of *Anders* violates *Teague v. Lane*, 489 U.S. 288 (1989). We address each of these arguments below.

[2] *Anders* is the Supreme Court's landmark pronouncement setting forth court-appointed appellate counsel's duty to further a client's case after determining the appeal to be without merit. *Anders* involved the situation where an indigent defendant's appointed counsel, after concluding an appeal was frivolous, filed a letter brief so informing the court. The letter noted that counsel remained at the court's disposal to brief any issues that the court were to see fit. The defendant's request for replacement counsel was denied, and the California Court of Appeals affirmed the conviction.

Anders subsequently filed a federal habeas petition, arguing that his right to effective counsel on appeal had been violated. The Supreme Court agreed. The Court was convinced that the appellate court reviewed Anders's claim without the benefit of briefing or advocacy based on "counsel's bare conclusion" that the appeal was frivolous. *Anders*, 386 U.S. at 742. The Court held that such a letter brief from defendant's counsel "cannot be an adequate substitute for the right to full appellate review." *Id.*



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(quoting *Eskridge v. Washington State Bd.*, 357 U.S. 214, 215 (1958)).

The Court in *Anders* outlined the appropriate procedures as follows:

The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae*. The no-merit letter and the procedure it triggers do not reach that dignity. Counsel should, and can with honor and without conflict, be of more assistance to his client and to the court. His role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court - not counsel - then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and

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therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

*Anders*, 386 U.S. at 744.

[3] In *Penson v. Ohio*, the Supreme Court explained that "*Anders*, in essence, recognizes a limited exception to the requirement articulated in [*Douglas v. California*, 372 U.S. 353 (1963)] that indigent defendants receive representation on their first appeal as of right." *Penson v. Ohio*, 488 U.S. 75, 83 (1988). This limited exception recognizes that the Fourteenth Amendment does not demand that a State require that appointed counsel pursue wholly frivolous appeals. *Id.* at 83-84. *Anders* and *Douglas* thus set forth the exclusive procedure through which appointed counsel's performance can pass constitutional muster: Appointed counsel must either provide active and vigorous appellate representation of indigent criminal defendants or, after concluding that any appeal would be wholly frivolous, request leave to withdraw and file a brief identifying anything in the record that might arguably support an appeal. *See Anders*, 386 U.S. at 744; *see also Penson*, 488 U.S. at 80, 83-84.

The California Supreme Court interpreted *Anders* in *People v. Feggans*, 67 Cal.2d 444, 432 P.2d 21 (1967), and later in *People v. Wende*, 25 Cal. 3d 436, 600 P.2d 1071 (1979). *Wende* quoted *Feggans* as stating the appropriate rule establishing the duty of counsel:

In *People v. Feggans* (1967) 67 Cal.2d 444, 62 Cal. Rptr. 419, 432 P.2d 21, we responded to the Supreme Court's mandate as follows: "Under *Anders*, regardless of how frivolous an

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appeal may appear . . . , a no-merit letter will not suffice. Counsel must prepare a brief to assist the court in understanding the facts and the legal issues in the case. The brief must set forth a statement of the facts with citations to the transcript, discuss the legal issues with citations of appropriate authority, and argue all issues that are arguable.... If counsel concludes that there are no arguable issues and the appeal is frivolous, he may limit his brief to a statement of the facts and applicable law and may ask to withdraw from the case, but he must not argue the case against his client. Counsel is not allowed to withdraw from the case until the court is satisfied that he has discharged his duty to the court and his client to set forth adequately the facts and issues involved. If counsel is allowed to withdraw, defendant must be given an opportunity to present a brief, and thereafter the court must decide for itself whether the appeal is frivolous. [Citations.] If any contention raised is reasonably arguable, no matter how the court feels it will probably be resolved, the court must appoint another counsel to argue the appeal. (*People v. Feggans, supra*, 67 Cal.2d at 447-48, 62 Cal.Rptr. at 421 P.2d at 23)."

*Wende*, 600 P.2d at 1073-74.

The State contends that, because Robbins's state appellate counsel's brief complies with the strictures of *Wende*, the district court erred in determining the brief to be insufficient under *Anders*. The State argues that appointed counsel's actions in this case satisfy the

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requirements of *Anders*, as construed by *Feggans* and *Wende*, because: (1) the nonexistence of arguable issues should have been inferred from counsel's failure to raise any; and (2) despite the fact that it should have been inferred that counsel concluded that there was a lack of arguable issues, it was not incumbent on him to withdraw because he had not "disabled himself from effectively representing" Robbins by describing his case as frivolous. See *Wende*, 600 P.2d at 1075.

[4] Our obligation in this habeas action is to determine whether appellate counsel met his obligation under the United States Supreme Court's requirement set forth in *Anders* and its progeny.<sup>2</sup> It is apparent that those requirements were not met. Robbins's appointed counsel neither provided active and vigorous appellate representation nor complied with *Anders* and *Feggans*. The brief filed on Robbins's behalf completely failed to identify any grounds that arguably supported an appeal. Rather, it briefly summarized the procedural and historical facts of the case and requested that the state appellate court "independently review the entire record for arguable issues." Accordingly, the district court correctly found that Robbins's counsel did not comply with *Anders*.

The State also argues that the district court erred in basing its grant of Robbins's habeas petition on the finding that at least two arguable issues existed for appeal. In making this argument, the State assumes that the

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2. We only address the obligations of appellate counsel in this decision. Our opinion in no way relieves the state court judges of their obligation under *Anders* and *Wende* to conduct their own independent review of the proceedings to decide whether the appeal is wholly frivolous.



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nonexistence of arguable issues would render appointed counsel's failure to comply with *Anders* harmless. We need not decide whether this assumption is correct because we conclude that the district court correctly determined that arguable issues existed.

The district court found that at least two nonfrivolous appellate issues existed in Robbins's case: (1) that the denial of Robbins's attempt to withdraw the waiver of his right to counsel constituted error; and (2) that the inadequacy of the county jail's library deprived him of a meaningful opportunity to prepare his defense. It further noted that there may well be other arguable issues. Robbins also points to several other exhausted, arguable appellate issues, including prosecutorial misconduct in violation of *Brady v. Maryland*, wrongful denial of Robbins's *Marsden* motions (motions under California law relating to the substitution of counsel), and interference with Robbins's constitutional right to prepare an adequate defense on his own behalf.

[5] *Anders* creates a very low threshold for which arguments counsel must brief of the court. See *United States v. Gruffy*, 895 F.2d 561, 563 (9th Cir. 1990); *Lombard v. Lynaugh*, 868 F.2d 1475, 1487 (5th Cir. 1989) (Goldberg, J., concurring). Certainly, counsel need not argue only "winning" arguments. Instead, counsel must bring to the court's attention "anything in the record that might arguably support the appeal." *Anders*, 386 U.S. at 744. For purposes of California law, an issue is "arguable" when it has some potential for success, meaning some possibility of a result requiring reversal or modification of the judgment. *People v. Johnson*, 123 Cal.App.3d 106, 109 (1981).

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[6] The two issues identified by the district court - (1) whether the denial of Robbins's attempt to withdraw the waiver of his right to counsel constituted error; and (2) whether the inadequacy of the county jail's library deprived him of a meaningful opportunity to prepare his defense - are arguable and should have caused the state appellate court to appoint new counsel for Robbins.<sup>3</sup> As noted by the district court:

The right guaranteed by the Fourteenth and Sixth Amendments to waive one's right to counsel and proceed in pro per "is premised upon the right of the defendant to make a defense. *Milton v. Morris*, 767 F.2d 1443, 1445-46 (9th Cir. 1985) (citing *Faretta v. California*, 422 U.S. 806, 819-20 (1975)). An incarcerated defendant cannot meaningfully exercise this right without access to tools such as law books. *Id.* at 1446; *Taylor v. List*, 880 F.2d 1040, 1047 (9th Cir. 1989).

The California trial judge's own words - "it's almost impossible as a pro per to prepare yourself a decent defense, especially given the law library" - justify the district court's conclusion that Robbins's inability to prepare an adequate defense was, in the very least, an arguable issue. The California trial judge even told Robbins that "if you are looking up law, you are not going to be able to find it because somebody has torn it out before you got there." There is some potential, had Robbins's appointed counsel raised and vigorously

3. Because we conclude that the district court correctly identified at least two arguable issues, we need not determine whether other arguable issues exist.



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advanced this issue on appeal, that Robbins's conviction would have been reversed.

As the district court noted, the California trial court's treatment of Robbins's request to withdraw his waiver of his right to counsel also raises a serious constitutional question. The district court stated, "[f]airly read, petitioner asked for the appointment of counsel as an alternative to advisory counsel. Because the judge failed to even consider whether petitioner was reasserting his right to counsel, it too is a nonfrivolous issue which should have been raised by petitioner's appellate counsel." We agree.

[7] Finally, the State argues that granting relief on Robbins's *Anders* claim violates *Teague v. Lane*. *Teague* held that new constitutional rules cannot be applied retroactively to cases on collateral review unless they fall into one of two narrow exceptions. It is clear, however, that the district court's holding in this case did not involve a new rule. Our discussion above indicates that the outcome of Robbins's case was pre-determined by the controlling analysis provided by the Supreme Court in *Anders* and *Penson*, both of which were handed down before Robbins's conviction. Likewise, the California Supreme Court's decision in *Feggans*, which is cited approvingly in *Wende*, compels the result in this case and was decided before Robbins's conviction. The consequences of counsel's failure to raise arguable issues were unambiguously detailed in *Anders* and *Feggans*. Application of *Anders* and *Feggans* to this case required no extension of precedent or logical interpolation. The facts of Robbins's case almost directly mirror those of *Anders*. Accordingly, no "new" constitutional rule was invoked in this case.

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## IV. Robbins's Cross-Appeal

Robbins argues in his cross-appeal that the district court erred when it failed to consider and to rule upon his allegations of constitutional error in the state court trial.

[8] Robbins brought eleven exhausted claims in the district court relating to his trial. Had Robbins not raised the *Anders* issue, the district court would have reached the merits of those claims. Had the district court ruled in Robbins's favor on them, a grant of habeas relief would have required either release or a new trial. The need for a new direct appeal - the remedy granted by the district court - would be obviated by this outcome. Robbins is entitled to have these foundational claims in his habeas petition considered first.

[9] The Eleventh Circuit has, in the exercise of its supervisory authority, directed district courts to rule on all claims raised in a petition for habeas corpus, even if the petition is granted on one claim. *Clisby v. Jones*, 960 F.2d 925, 936 (11th Cir. 1992) (en banc). This has the advantage of avoiding possible remands for consideration of remaining claims if the district court's decision on one claim is reversed. It has the disadvantage of requiring considerable extra work by the district court to decide many claims that may be completely unnecessary, because they will be mooted on appeal.

[10] We have taken a different approach in our circuit. In *Blazak v. Ricketts*, 971 F.2d 1408, 1413 (9th Cir. 1992) (per curiam), we declined to apply the *Clisby* approach to a capital case in which the district court granted the writ on one guilt phase issue without deciding all the remaining guilt phase issues or any of the penalty

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phase issues. We drew a distinction, however, between a case which granted a petition on a sentencing issue but left unresolved an issue affecting the validity of the conviction. *Id.* at 1413-14. We stated:

Moreover, unlike habeas grants exclusively on sentencing issues, the grant of a habeas petition because of the constitutional invalidity of a conviction raises concerns that a possibly innocent person has been unjustifiably incarcerated on death row for a number of years. Delaying retrial in such cases, while attorneys fight over a sentence that may no longer exist, risks the perpetuation of a monumental injustice, should retrial ultimately result in an acquittal.

*Id.* at 1414 n.7. The same policy considerations are involved in this case. Granting the writ only for the ineffective assistance of counsel on appeal leaves the challenges underlying the conviction unresolved. Resolving other issues while leaving challenges to the underlying conviction unresolved potentially can cause grave injustice to defendants like Robbins who, despite alleging constitutional shortcomings in the trial process, must await resolution of a renewed appeal while potentially deserving a retrial and possibly an acquittal.

*Penson v. Ohio*, cited by California in opposition to Robbins's claim, is inapposite. *Penson* was an indigent defendant who was convicted of several serious felonies. His appointed appellate counsel filed a letter brief certifying his appeal to be meritless and asking to withdraw. In violation of *Anders*, the Ohio Court of Appeals allowed counsel to withdraw and conducted its

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own review of the record without the benefit of advocacy or briefing. *Penson*, 488 U.S. at 78. The Ohio court found "several arguable claims," reversed one of his convictions, and then dismissed his appeal. *Id.* at 79. *Penson* petitioned for a writ of certiorari. The Supreme Court granted the petition and reversed.

[11] *Penson* is unlike the case at bar because it involved the Supreme Court's review of the Ohio appellate court's dismissal of *Penson*'s direct appeal. When the Court recognized that "several arguably meritorious grounds for reversal" existed, it remanded the matter to the Ohio appellate court for further proceedings. *Id.* It was, however, reviewing the direct appeal of a state court action, and not a habeas petition. In this circumstances, the Court explained that it would not "sit in place of the Ohio Court of Appeals *in the first instance* to determine whether petitioner was prejudiced as to any appellate issue." *Id.* at 87 n.9 (emphasis added.) In this habeas proceeding the district court will be considering alleged constitutional errors in the defendant's trial that have been exhausted in the state court. Robbins is entitled to have those trial issues considered at this time just as any other habeas petitioner would. The fact that Robbins also presents an allegation of ineffective assistance of appellate counsel is a secondary issue that comes into play only if the district court denies relief for trial errors. That appeal would then be a renewal of the direct appeal as in *Penson* and could encompass any issues that could have been raised on direct appeal.

[12] Because the district court should have addressed the claims of trial error first, it might not have needed to address Robbins's claim of appellate error as well. Because it did address the appellate claims, however, and

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because it decided those questions correctly, it is in the interest of judicial economy and efficiency to affirm them now. If trial error is found to have occurred and to require vacation of the conviction, the appellate errors will become immaterial. If no such trial errors are found, however, the district court's original order will again become applicable. *Cf. Penson*, 488 U.S. at 88-89 (the actual or constructive denial of assistance of counsel is presumed to result in prejudice); *Lombard*, 868 F.2d at 1487 (formal physical presence of appellate attorney is not appellate counsel; defendant constructively denied assistance of counsel where attorney filed document containing no arguments going to merits of appeal).

## V. CONCLUSION

The judgment of the district court is **AFFIRMED IN PART** but the case is **REMANDED** to the district court for consideration of whether the alleged constitutional trial errors that defendant raises merit reversal of Robbins's underlying convictions and the granting of a new trial.

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT SOUTHEAST J      HON. JOHN A. TORRIBIO,  
JUDGE

THE PEOPLE OF THE STATE	)
OF CALIFORNIA,	) NO. A481636
	)
Plaintiff,	)
	)
v.	)
	)
LEE ROBBINS,	)
	)
Defendant.	)

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
MARSDEN HEARING  
DECEMBER 20, 1989

## APPEARANCES:

## FOR THE PEOPLE:

IRA REINER, DISTRICT ATTORNEY  
BY: ROBERT SAMOIAN, DEPUTY  
TIA GRAVES, DEPUTY  
12720 Norwalk Boulevard  
Norwalk, California 90650-0415



FOR THE DEFENDANT:

WILBUR F. LITTLEFIELD  
PUBLIC DEFENDER  
BY: RALPH SEIFER, DEPUTY  
12720 Norwalk Boulevard  
Norwalk, California 90650

MAVIS R. DEL VECCHIO, CSR #1364  
OFFICIAL REPORTER

NORWALK, CALIFORNIA; WEDNESDAY,

DECEMBER 20, 1989; 10:24 A.M.

DEPARTMENT SOUTHEAST J HON. JOHN A.  
TORRIBIO, JUDGE

APPEARANCES:

THE DEFENDANT WITH HIS COUNSEL,  
RALPH SEIFER, DEPUTY PUBLIC DEFENDER  
MAVIS R. DEL VECCHIO, OFFICIAL  
REPORTER

THE COURT: OKAY. MR. ROBBINS IS PRESENT.  
MR. ROBBINS IS PRESENT BEFORE THE COURT.  
THE DISTRICT ATTORNEY'S STAFF HAS  
VACATED. MR. ROBBINS WAS ARRAIGNED  
YESTERDAY AND ASKED AT THAT TIME TO  
HAVE A CONVERSATION WITH THE COURT  
REGARDING REPRESENTATION BY MR. SEIFER.  
DUE TO THE CONGESTED CALENDER, I PUT IT  
OVER TO THIS MORNING.

MR. ROBBINS, PROCEED.

THE DEFENDANT: YOUR HONOR, I BELIEVE THERE IS A CONFLICT OF INTEREST BETWEEN MYSELF AND THE PUBLIC DEFENDER'S OFFICE IN REGARDS TO THIS CASE. MY INSTRUCTIONS HAVE NOT BEEN FOLLOWED I HAVE GIVEN TO MR. SEIFER REGARDING THE CASE.

THE COURT: WHAT ARE THE INSTRUCTIONS YOU HAVE GIVEN HIM?

THE DEFENDANT: UH -- MR. SEIFER INTRODUCED A --

THE COURT: EXCUSE ME. WHAT ARE THE INSTRUCTIONS HAVE YOU GIVEN HIM? YOU TELL ME THINGS AND I WILL ASK QUESTIONS AND THEN IT WILL MAKE --

THE DEFENDANT: WHAT INSTRUCTIONS HAVE I GIVEN HIM?

THE COURT: YES.

THE DEFENDANT: I INSTRUCTED TO -- TO HAVE EVIDENCE SUPPRESSED THAT WAS ILLEGALLY OBTAINED HE INTRODUCED AT THE PRELIMINARY, AT THE INSTRUCTIONS --

THE COURT: IN OTHER WORDS, HE MADE A LEGAL DECISION THAT YOU DISAGREED WITH?

THE DEFENDANT: YES, SIR.

THE COURT: OKAY. ANYTHING ELSE?

THE DEFENDANT: HE HAS FAILED TO FILE A DISCOVERY MOTION I INSTRUCTED HIM TO FILE. HE HAS STATED THAT THE PROSECUTOR WOULD BE COOPERATING WITH HIM, BUT WHICH HAS NOT BEEN THE CASE.

THE COURT: OKAY.

THE DEFENDANT: HE'S HAD ME TRANSPORTED TO COURT LAST TIME, SO HIM AND MR. WEBB COULD TRY TO GET ME TO ACCEPT AN OFFER THE PROSECUTOR MADE

WHICH WAS AGAINST MY INSTRUCTIONS. I HAD ALREADY REFUSED THE OFFER.

THE COURT: WHAT WAS THE OFFER THAT WAS GIVEN TO YOU?

THE DEFENDANT: A SIX-YEAR DEAL.

THE COURT: AND WHAT IS THE PRESENT CHARGE AGAINST YOU, MR. ROBBINS?

THE DEFENDANT: IT IS --

MR. SEIFER: 187 AND ONE COUNT OF 487, YOUR HONOR.

THE COURT: 187 SECOND DEGREE OR FIRST DEGREE?

MR. SEIFER: FIRST DEGREE, YOUR HONOR.

THE COURT: OKAY. NEXT THING, MR. ROBBINS?

THE DEFENDANT: HE'S REPEATEDLY REFUSED TO GIVE ME COPIES OF REPORTS AND DEPOSITIONS AND SUCH, AND FINALLY JUST FLAT REFUSED TO GIVE ME ANY COPIES OF IT.

I WISH TO HAVE THE INFORMATION, SO I COULD REVIEW THE REPORTS AND SEE WHAT WAS GOING ON IN REFERENCE TO MY CASE. I HAVE BEEN MORE OR LESS KEPT IN THE DARK REGARDING IT AT THIS POINT.

THE COURT: WELL, EXCUSE ME. YOU APPEARED IN SUPERIOR COURT FOR THE FIRST TIME YESTERDAY, SO MR. SEIFER RECEIVED THE TRANSCRIPTS FOR THE FIRST TIME YESTERDAY. COULDN'T POSSIBLY GIVE IT TO YOU TILL HE HAS READ IT.

MR. SEIFER: MR. ROBBINS HAS READ IT BEFORE I DID, YOUR HONOR. I GAVE IT TO HIM YESTERDAY MORNING WHILE HE WAS WAITING TO COME OUT FOR ARRAIGNMENT AND I -- I GAVE HIM MY COPY TO READ, NOT TO KEEP. AND HE DID NOT READ IT YESTERDAY MORNING.



THE DEFENDANT: I WAS REFERRING TO MOST OF THE OTHER REPORTS.

THE COURT: THERE ARE NO OTHER DEPOSITIONS BESIDES -- I USE "DEPOSITION" FOR A TRANSCRIPT, TESTIMONY. BUT THAT'S THE ONLY FILE, ONLY TRANSCRIPT THAT'S AVAILABLE THAT NORMALLY OCCURS IN A CRIMINAL CASE.

ANY OTHER TRANSCRIPTS OF ANY TYPE, MR. SEIFER?

MR. SEIFER: YOU HONOR, THERE ARE NO DEPOSITIONS OR TRANSCRIPTS. THERE ARE --

THE COURT: EXCUSE ME, GENTLEMEN. COULD YOU JUST --

MR. SEIFER: THERE IS A NUMBER OF ARREST REPORTS AND POLICE REPORTS. THIS CASE GOES BACK TO NEW YEAR'S OF 19 -- LAST NEW YEAR'S, YOUR HONOR, AND THERE HAS BEEN EXTENSIVE POLICE INVESTIGATION. I

GAVE MR. ROBBINS A COPY FOR HIS OWN -- FOR HIS OWN USE OF ONE OF THE SUPPLEMENTAL REPORTS. I HAVE NOT GIVEN HIM THE MAIN REPORT, HOWEVER, WHICH IS, I THINK, 75 OR A HUNDRED PAGES.

THE COURT: WELL, I CAN'T TELL YOU TO GIVE THE REPORT TO HIM, BUT I WOULD SUGGEST PERHAPS YOU GIVE THE REPORT TO HIM.

ANYTHING ELSE, MR. ROBBINS?

THE DEFENDANT: UM -- HE'S DISCUSSED THE CASE WITH OTHER PUBLIC DEFENDERS, WHICH I DIDN'T WISH THE CASE TO BE DISCUSSED.

THE COURT: EXCUSE ME. I AM GOING TO STOP YOU RIGHT THERE. HE WOULD BE A FOOL NOT TO DISCUSS THE CASE WITH OTHER PUBLIC DEFENDERS. ONE OF THE GREAT BENEFITS OF BELONGING TO THE LOS ANGELES

COUNTY PUBLIC DEFENDER'S OFFICE IS THE NUMBER OF CAPABLE LAWYERS THAT ARE IN THAT OFFICE THAT YOU CAN DISCUSS YOUR CASES WITH AND DISCUSS STRATEGIES AND METHODS OF APPROACH AND METHODS OF PROPERLY REPRESENTING YOUR CLIENTS, AND SO IF THAT -- IF THAT OFFENDS YOU, THAT IS TOO BAD.

THERE IS NOTHING -- IN FACT HE WOULD BE DERELICT TO SIT DOWN IN THAT OFFICE WITH 10 OTHER LAWYERS THAT HAVE COMBINED TWO OR THREE HUNDRED JURY TRIALS BETWEEN THEM AND SIT THERE AND NOT SAY TO SOMEBODY, I HAVE THE FACTS. THESE ARE THE FOLLOWING FACTS. WHAT DO YOU THINK ABOUT THIS? THAT'S THE ONE THING THAT THE PUBLIC DEFENDER HAS OVER ANY OTHER DEFENSE LAWYER IN THE UNITED STATES, IS THE ABILITY TO SIT DOWN WITH

PEOPLE THAT CARE ABOUT YOUR CASE AND TALK TO YOU ABOUT IT. 'CAUSE THE PRIVATE PRACTITIONER JUST HAS TO TALK TO GUYS ON A CATCH AS CATCH CAN BASIS. SO THAT YOU MAY NOT LIKE IT, BUT IF HE DOESN'T DO THAT, PERSONALLY I FIND HIM PRACTICING BELOW THE STANDARD OF PRACTICE.

SO WHAT'S THE NEXT THING?

THE DEFENDANT: THE WEP -- THE MURDER WEAPON IN THE CASE, THE EVIDENCE WAS TAMPERED WITH. MR. SEIFER DOESN'T SEEM TO FEEL VERY CONCERNED ABOUT THAT.

THE COURT: SEE, YOU CAN MAKE ACCUSATIONS ALL YOU WANT. IN FACT, THAT IS WHAT YOU HAVE DONE, IS MADE A LOT OF ACCUSATIONS HERE, NONE OF WHICH MAKE MUCH SENSE, BECAUSE THEY ARE ALL ARGUMENTATIVE.

YOU SAID THE WEAPON HAS BEEN TAMPERED THIS. WELL, THAT IS AN INTERESTING COMMENT, BECAUSE PART OF THE PROBLEM -- BECAUSE THE ONLY WAY YOU CAN ASSERT THAT IS IF YOU GET ON THE STAND AND SAY IT HAS BEEN TAMPERED WITH. HE MAY NOT -- HE MAY NOT WANT YOU TO DO THAT, HE MAY NOT WANT YOU TO TAKE THE STAND. I KNOW THE MURDER WEAPON, BECAUSE IT HAS BEEN TAMPERED WITH. BECAUSE DOING THAT, YOU MAY CONNECT YOURSELF WITH A MURDER WEAPON YOU DON'T HAVE YOURSELF CONNECTED WITH.

THE DEFENDANT: I AM REFERRING TO THE REPORTS. THE WEAPON, WHEN IT WAS CONFISCATED -- IT WAS HANDGUN -- HAD A SCOPE ON IT AND GRIPS. WHEN IT WAS PRESENTED AT THE PRELIMINARY, THERE WAS

NO SCOPE ON IT AND ONE OF THE GRIPS WAS MISSING FROM IT.

THE COURT: YOU CALL THAT TAMPERED WITH?

THE DEFENDANT: IT WAS ALTERED.

THE COURT: OKAY. NEXT COMPLAINT, MR. ROBBINS.

THE DEFENDANT: THERE IS NUMEROUS THINGS I FEEL THAT SHOULD HAVE BEEN INVESTIGATED IN THE CASE.

THE COURT: WHAT ARE THEY, MR. ROBBINS?

THE DEFENDANT: AT THE CRIME SCENE, THE NEXT-DOOR NEIGHBORS HAD DISTINCTLY HEARD THE GUN FIRE BETWEEN THE MURDERER AND THE VICTIM. THEY COMMENT TO, I BELIEVE IT IS, MR. SEIFER THAT IT WAS STRANGE THEY DIDN'T HEAR THE DOG BARKING, WHICH WOULD INDICATE THAT THE



PERSON, THE MURDERER WAS EITHER WELL KNOWN TO THE PEOPLE, TO -- YOU KNOW, WAS WELL KNOWN TO THEM OR IN FACT MURDERER WAS ALREADY THERE AND WAS LEAVING WHEN THEY HAD THE SHOOT-OUT.

THE COURT: THAT IS ARGUMENT. THAT IS NOT EVIDENCE. THAT IS SOMETHING YOU ARGUE TO THE JURY.

THE DEFENDANT: IT IS THINGS THAT MR. SEIFER --

THE COURT: WHAT WOULD YOU DO AS THE INVESTIGATOR? THE DOG IS NOT BARKING. YOU WANT THAT INVESTIGATED; IS THAT RIGHT. HOW DO YOU INVESTIGATE THAT? I AM JUST IDLY CURIOUS.

THE DEFENDANT: WELL, I EXPLAINED --

THE COURT: YOU HAVE ACCUSED THIS MAN OF BEING INCOMPETENT, NOT HAVING YOUR INTERESTS AT HEART, AND YOU HAVE

JUST SAID HE FAILED TO INVESTIGATE A DOG NOT BARKING. WELL, YOU HAVE ALREADY SAID THAT YOU HAVE GOT ALL THIS ADVICE AND SUGGESTIONS AND SPECIFIC INSTRUCTIONS TO HIM. WHAT SPECIFIC INSTRUCTION WOULD YOU GIVE TO HIM AS TO HOW TO INVESTIGATE A DOG NOT BARKING?

THE DEFENDANT: WELL, I EXPLAINED --

THE COURT: EXPLAIN IT TO ME RIGHT NOW.

THE DEFENDANT: YES, SIR. I EXPLAINED TO HIM THAT THE DOG WAS -- HAD SUFFERED FROM -- I BELIEVE IT IS CALLED PARVO -- AS A PUPPY, AND IT HAD -- HAD -- IT WAS MENTALLY RETARDED. HE DID NOT CHECK WITH THE VET AS I SUGGESTED TO VERIFY THAT FACT.

THE COURT: IN THIS MATTER, CRIMINAL PROCEEDINGS ARE SUSPENDED. I HAVE A DOUBTS THAT THIS MAN IS MENTALLY

COMPETENT TO STAND TRIAL. I WILL APPOINT TWO DOCTORS ON MY OWN MOTION TO EXAMINE THE DEFENDANT. MAY I HAVE THE LIST, PLEASE.

I WILL APPOINT DR. MARVIN EISENBERG

--

MR. SEIFER: IS THAT -- I AM SORRY. IS THAT AN I OR --

THE COURT: E-I-S-E-N-B-E-R-G.

-- AND A DR. JOHN MEAD TO EXAMINE THE DEFENDANT PURSUANT TO 1368 OF THE PENAL CODE TO DETERMINE HIS PRESENT MENTAL SANITY, WHETHER HE IS ABLE TO KNOW, UNDERSTAND THE NATURE OF THE CHARGES, AND COOPERATE WITH COUNSEL IN A RATIONAL MANNER. CRIMINAL PROCEEDING ARE SUSPENDED. RETURN DATE, JANUARY 24TH, 1990.

THE COURT DENIES THE MARSDEN MOTION. THE COURT SEES NOTHING TO INDICATE THAT MR. SEIFER HAS DONE NOTHING HE IS SUPPOSED TO DO.

I WOULD SUGGEST, MR. SEIFER, THAT JUST AS A MATTER OF -- WHAT? -- CLIENT RELATION YOU GIVE HIM ALL COPIES OF ANY AND ALL DOCUMENTS. I UNDERSTAND SOMETIMES THE PUBLIC DEFENDER'S OFFICE DOESN'T LIKE TO DO THAT, BUT OTHER THAN THAT, FOR THE RECORD, THE COURT IS WELL AWARE THE INFORMAL DISCOVERY POLICY OF THE NORWALK BRANCH OF THE LOS ANGELES DISTRICT ATTORNEY'S OFFICE, BOTH AS A TRIAL ATTORNEY IN THE AREA FOR 16 YEARS AND AS A JUDICIAL OFFICER FOR THE LAST 4 YEARS. IN MY TWENTY-PLUS YEARS OF EXPERIENCE WITH THIS COURTHOUSE, I'VE NEVER KNOWN OF A PROBLEM TO ARISE

PERSONALLY WHERE THE DISTRICT ATTORNEY HAS FAILED TO COMPLY WITH DISCOVERY, WHEN REQUESTED.

MR. SEIFER: JIM FAGAN IS THE D.A. ON THAT CASE

THE COURT: I KNOW -- I KNOW THAT ALL DISCOVERY -- THE COURT WILL INDICATE THAT MR. FAGAN IS PROBABLY -- I WON'T SAY THE MOST HONORABLE, BUT AS HONORABLE AS ANY OTHER PROSECUTOR IN THE UNITED STATES AND IN FACT IS FAMOUS FOR GIVING ALL BENEFICIAL EVIDENCE TO THE DEFENSE, WITHOUT THE NECESSITY OF REQUEST.

BUT PERHAPS, MR. SEIFER, IT WOULD BE BEHOOVE YOU AS A MATTER OF CAUTION TO FILE A MOTION.

THE MOTION IS DENIED, PLUS THE COURT HAS A DOUBT OF THE DEFENDANT IN

TERMS OF SANITY IN ORDER OF 1368. MOTION DENIED.

MR. SEIFER: THERE IS A 995 MOTION WHICH I BELIEVE THE COURT CALENDARED YESTERDAY FOR JANUARY.

THE COURT: I BELIEVE I CAN PROCEED ON THAT MOTION. I DON'T BELIEVE -- WHAT'S THE LAW ON THAT? I THINK THERE IS SOME MOTIONS YOU CAN KEEP DOING IF THEY RESULT IN THE CHARGE BEING DISMISSED. ISN'T THAT ONE OF THEM? WHY DON'T YOU CHECK WITH YOUR APPELLATE DEPARTMENT.

MR. SEIFER: RIGHT.

THE COURT: BECAUSE THE POINT IS IF HE HAS A VIABLE 995 --

MR. SEIFER: THE 1368 ISSUE GOES AWAY.

THE COURT: -- GOES AWAY.

MR. SEIFER: OF COURSE.



THE COURT: AND I THINK THAT THE LAW IS THAT YOU CAN GO -- WHERE THE MOTION WILL RESULT IN A BENEFIT TO THE DEFENDANT, YOU CAN -- I THINK YOU CAN PROCEED. WHY DON'T YOU CHECK WITH THE - - WE WILL LEAVE THAT DATE, IN ANY EVENT, AND IF IN FACT YOUR APPELLATE DEPARTMENT SAYS NO, WE WILL TAKE IT OFF CALENDAR.

MR. SEIFER: DID THE COURT --

THE COURT: THAT WOULD ENCOURAGE YOU TO GET THE PAPERS.

MR. SEIFER: IS THE COURT VACATING THE TRIAL DATE IN THIS CASE?

THE COURT: THE DATE IS VACATED.

MR. SEIFER: AND THE REPORT BEING ASKED FOR FROM DR. EISENBERG AND DR. MEAD, IF I MAY FOR THE RECORD, THAT IS A CONFIDENTIAL REPORT?

THE COURT: NO, 1368 REPORTS ARE NOT CONFIDENTIAL, BUT THEY CAN NOT BE USED FOR ANY PURPOSE BY THE PROSECUTION. THEY ARE FOR THE COURT'S BENEFIT, TO ENABLE THE COURT TO JUDGE THE PRESENT SANITY OF THIS INDIVIDUAL PURSUANT TO 1368 STANDARDS, SO THEY WILL BE TO THE COURT.

IN THAT REGARD, MR. SEIFER, I WOULD -- WE DON'T NEED THEM FOR ANYTHING ELSE. THAT IS NOT RELEVANT TO THE ISSUES. THEY DON'T NEED THE TRANSCRIPTS OR ANYTHING. SO THAT'S THE ORDER.

MR. SEIFER: THANK YOU, YOUR HONOR.

(PAUSE IN THE PROCEEDINGS.)

THE COURT: WAIT. WE BETTER SEE IF THE D.A. -- D.A. WASN'T PRESENT FOR THE 1368. THEY MIGHT WANT IN.

(THE FOLLOWING PROCEEDING WERE HELD IN OPEN COURT, THE DEFENDANT NOT BEING PRESENT BUT REPRESENTED BY COUNSEL, WITH THE PEOPLE BEING REPRESENTED BY ROBERT SAMOIAN AND TIA GRAVES, DEPUTIES DISTRICT ATTORNEY.)

THE COURT: THE COURT'S DECLARED A DOUBT UNDER 1368 AND APPOINTED TWO DOCTORS TO EXAMINE THE DEFENDANT.

WHAT WAS THE RETURN DATE ON THAT?

(THE CLERK AND THE COURT CONFER OFF THE RECORD.)

THE COURT: SET A RETURN DATE OF JANUARY 24. ALSO, IT IS MY UNDERSTANDING WE STILL COULD PROCEED WITH THE 995 MOTION. DO YOU KNOW WHAT THE LAW IS ON THAT? BECAUSE THAT COULD RESULT IN THE

CHARGES BEING DISMISSED. DOES ANYBODY HAVE ANY THOUGHTS ON THAT?

MS. GRAVES: YES. IN THE CASE THAT WE DID IN HERE WITH MR. FISHER ON CASPER, THERE WAS SOME CASE LAW AND I THINK I MIGHT BE ABLE TO DIG IT UP.

MR. SAMOIAN: SHE HAD THE CASE LAW

MS. GRAVES: AND IT WAS SOMEHOW RELATED TO 1368 AND 995 AND HOW IT FIT TOGETHER, SO I WILL SEE IF I CAN FIND SOMETHING.

MR. SEIFER: AND I WILL TRY AND GET A READING OUT OF DOWNTOWN ON THAT. THANK YOU.

THANK YOU.

(THE MATTER WAS CONTINUED TO JANUARY 24, 1998.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT SOUTHEAST J HON. JOHN A. TORRIBIO,  
JUDGE

THE PEOPLE OF THE STATE )  
OF CALIFORNIA, ) NO. A481636  
 )  
Plaintiff, ) REPORTER'S  
 ) CERTIFICATE  
v. )  
 )  
LEE ROBBINS, )  
Defendant. )  
\_\_\_\_\_ )

STATE OF CALIFORNIA )  
 ) SS  
COUNTY OF LOS ANGELES )

I, MAVIS R. DEL VECCHIO, OFFICIAL  
REPORTER OF THE SUPERIOR COURT OF THE  
STATE OF CALIFORNIA, FOR THE COUNTY OF  
LOS ANGELES, DO HEREBY CERTIFY THAT THE  
FOREGOING PAGES 1 THROUGH 11 COMPRISE A  
FULL, TRUE, AND CORRECT TRANSCRIPT OF  
THE MARSDEN PROCEEDINGS TAKEN IN THE

MATTER OF THE ABOVE-ENTITLED CAUSE ON  
DECEMBER 20, 1989.

DATED THIS 11TH DAY OF NOVEMBER, 1990.

\_\_\_\_\_, CSR #1364  
OFFICIAL REPORTER



OFFICE OF THE PUBLIC DEFENDER  
 BY: RALPH L. SEIFER, DEPUTY  
 12720 Norwalk Boulevard  
 Norwalk, CA 90650  
 Telephone: (213) 807-7302  
 Attorney for Defendant

FILED  
 JAN 24 1990  
 FRANK S. ZOLIN, COUNTY CLERK

IN THE SUPERIOR COURT OF THE  
 STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

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THE PEOPLE OF THE STATE	)	
OF CALIFORNIA,	)	
	)	Case No. A481636
Plaintiff,	)	
	)	MOTION FOR
vs	)	DISCOVERY
	)	
LEE ROBBINS,	)	
	)	
Defendant,	)	
_____	)	

TO: THE DISTRICT ATTORNEY OF LOS ANGELES  
 COUNTY:

PLEASE TAKE NOTICE THAT the above-named defendant by this attorney, RALPH L. SEIFER, will move the above-entitled court in Department "J" thereof on the 24th day of January , 1990, at the hour of

9:00 A.M., or as soon thereafter as counsel can be heard, for an order of this court directing you to make available to defendant's attorney for examination, copying, and/or hearing within seven judicial days of the filing of such order, any and all of the following items, facts, or information which are in the actual or constructive possession of you or any of your deputies, investigators, employees, or agents including, but not limited to, such of the following items which are available to your or any such deputies, investigators, employees, or agents, and are in the possession of members of any police or sheriff's department or of any other state or federal law enforcement agency.

Defendant additionally moves that the court's discovery order be continuing and that it direct each of the above-noticed persons and agencies to make diligent, good faith efforts obtain, preserve, and make available the following items:

1. All statements or utterances by defendant relative to this case, whether oral, written, or videotaped, signed or unsigned, regardless of the method of recording or preservation, and regardless of whether different recordings or preservations of the statements are duplicates, including, but not limited to, statements preserved by memory, whether or not reduced to writing. This shall include, but not be limited to:

a. All statements or utterances by defendant made after arrest any law enforcement personnel, or overheard by and law enforcement personnel; including, but not limited to, letters written by the defendant from the Los Angeles County jail, and statements received as a result of electronic listening devices, or other eavesdropping or surveillance methods used, during defendant's incarceration, detention, or interrogation by any police agencies or the Sheriff of Los Angeles County;

b. All statements or utterances by defendant made to any persons who are witnesses to the alleged

crimes or are potential witnesses in the prosecution of this case. This shall include, but not be limited to, any persons known by law enforcement personnel to have had conversations with defendant while incarcerated by those law enforcement agencies. [Brady v. Maryland (1963) 373 U.s. 83; Powell v. Superior Court (1957) 48 Cal.2d 704, 707-09; People v. Carter (1957) 48 Cal.2d 737, 752-53; Vance v. Superior Court (1958) 51 Cal.2d, 93-94; Cash v. Superior Court (1959) 53 Cal.2d 72, 75-76; Craig v. Superior Court (1976) 54 Cal.App.3d 416, 423-24; McAllister v. Superior Court (1958) 165 Cal.App.2d 297, 300.]

SO ORDERED                    [     ]  
 DENIED                        [     ]  
 ORDERED AS MODIFIED:

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX  
 XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX  
 XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX  
 XXXXXXXXXXXXXXX

XXXXXX            XXXXXXXX  
 XXXXXX            XXXXXXXX  
 XXXXXXXXXXXX XXXXXXXX

2. The names, addresses, and telephone numbers of all individuals who have filed complaints relating to acts of aggressive behavior, violence and/or attempted violence, excessive force and/or attempted excessive force, or other improper tactics by [police or sheriff's officers who participated in defendant's post-arrest interrogation]; copies of any such complaints; copies of the investigative reports based on such complaints, including statements of witnesses interviewed, information concerning the officers' use of excessive force or violence, and statements of psychiatrists, psychologists or other officers contained in the personnel files of the above-named officers or in the possession.

10. All notes and memoranda, of any kind, handwritten or typed, and all reports made by any law enforcement personnel relating to those statements described in paragraphs 1, 2, and 9 above.



[People v. Ruthford (1975) 14 Cal.3d 399, 405-06; Funk v. Superior Court (1959) 52 Cal.2d 423, 424; People v. Rennie (1962) 201 Cal.App.2d 1, 4-5.]

SO ORDERED                    [   ]  
 DENIED                        [   ]  
 ORDERED AS MODIFIED:

11. The complete criminal record ("rap sheet")  
 of the defendant.

[Joe v. Superior Court (1970) 3 Cal.3d 797; In re Ferguson (1971) 5 Cal. 525; People v. Beagle (1972) 6 Cal.3d 441; People v. Garner (1961) 57 Cal.2d 135; Hill v. Superior Court (1974) 10 Cal.3d 812; Engstrom v. Superior Court (1971) 20 Cal.App.3d 240; People v. Campbell (1972) 27 Cal.App.3d 849.]

12. The criminal record of all witnesses who may  
 be called to testify at the trial of this case.

[People v. Alexander (1983) 140 Cal.App.3d 647, 659.]

SO ORDERED                    [   ]  
 DENIED                        [   ]  
 ORDERED AS MODIFIED:

13. The date, place, and nature of all prior  
 felony convictions of (1) the defendant, and (2) all  
 witnesses who may be called to testify at the trial of the  
 case.

[Hill v. Superior Court (1974) 10 Cal.3d 812; In re Ferguson (1971) 5 Cal.3d 525; Engstrom v. Superior Court (1971) 20 Cal.App.3d 240; Evidence Code section 788.]

14. All records concerning arrests of the alleged  
 victim for specific acts of aggression, together with the  
 names and addresses of all witnesses to such acts.

Engstrom v. Superior Court (1971) 20 Cal.App.3d 240.]

SO ORDERED                    [   ]  
 DENIED                        [   ]  
 ORDERED AS MODIFIED:

15. As to (1) this defendant, (2)  
 all witnesses who may be called to testify at the trial of  
 this case, all pending criminal charges against such persons  
 anywhere in the State of California, all information  
 regarding the current parole and/or probation status of  
 such persons, and all arrests, criminal charges, ongoing  
 criminal investigations, or actions pending anywhere in the  
 State of California since the date of the alleged offense  
 charged in the Information.

20. All reports and records of all chemical, biological, medical, criminological, laboratory, or other testing and examination of any physical evidence obtained in the investigation of this case, including, but not limited to, the victim's body, bodily fluids and/or clothing, and the defendant's body, bodily fluids and/or clothing, and samples of any such remaining fluids or specimens.

Any written reports, notes, tape recordings or other records or documents used or completed in the course of such testing and examination shall be preserved and a copy provided to defense counsel, together with the name, address and telephone number of all persons who conducted or performed any such test, examination or analysis, or who reviewed it in an attempt to arrive at an expert opinion, with a copy of each person's report, evaluation, review and/or analysis.

[People v. Johnson (1974) 38 Cal.App.3d 288, 234-36; Norton v. Superior Court (1959) 173 Cal.App.2d 133; Schindler v. Superior Court (1958) 161 Cal.App.2d 513; Walker v. Superior Court (1957) 155 Cal.App.2d 134.]

SO ORDERED [ ]  
DENIED [ ]  
ORDERED AS MODIFIED:

21. The results of all laboratory tests by any investigative laboratory or law enforcement agency concerning examination of physical, photographic or written evidence connected with the investigation of any aspect of this case, together with all written reports regarding such tests.

[Walker v. Superior Court (1957) 155 Cal.App.2d 134, 138, 140.]

SO ORDERED [ ]  
DENIED [ ]  
ORDERED AS MODIFIED:

22. All psychiatric, psychological, or social evaluations or studies of the victim(s) which tend to show a propensity for violence.

[Ballard v. Superior Court (1966) 64 Cal.2d 159; People v. Dena (1972) 25 Cal.App.3d 1001.]

SO ORDERED [ ]  
DENIED [ ]  
ORDERED AS MODIFIED:

23. Prints or slides of all photographs or videotapes taken of the defendant in connection with the alleged offense, together with the date each photograph or videotape was taken and the name and address of the person who took it.

[People v. Ruthford (1975) 14 Cal.3d 399, 405-09; Norton v. Superior Court (1959) 173 Cal.App.2d 133, 136.]

SO ORDERED                    [   ]  
 DENIED                        [   ]  
 ORDERED AS MODIFIED:

24. Prints of all photographs or slides, including any technician's diagrams, taken of the scene of the alleged crimes or the victims of the alleged crimes, or otherwise relating to the case, including the date when each photograph was taken, and the name and address of the person who took or prepared it.

SUPERIOR COURT OF CALIFORNIA  
 COUNTY OF LOS ANGELES

PEOPLE OF THE STATE	)	NO. A481636
OF CALIFORNIA,	)	
	)	
Plaintiff,	)	DECLARATION IN
	)	SUPPORT OF MOTION
v.	)	FOR DISCOVERY
	)	
LEE ROBBINS,	)	
	)	
Defendant.	)	
_____		)

I RALPH L. SEIFER , declare as follows:

I am the attorney for the defendant in the above-entitled action.

This matter is now set for further proceedings in Department "J" of the above-entitled Court on Jan. 24, 1990, at the hour of 9:00.

An investigation of the charges alleged against the defendant has been made by officers or agents of the District Attorney of Los Angeles County and other law enforcement agencies.



Declarant is informed and believes that these law enforcement agencies have in their possession or under their control some or all of the information described in the Motion for Discovery served and filed herewith; that it is necessary that such information be made available to the defendant and his counsel in order to prepare for trial; that the information requested is material and relevant to the trial of this action, is under the control of the aforementioned agencies, and is not known to the defendant or his counsel; and that the trial or other disposition of this case will be expedited by the prompt disclosure of such information to the defendant and his counsel.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, and that this declaration was executed on \_\_\_\_\_, 1990 at Norwalk, CA.

---

Attorney for Defendant  
RALPH L. SEIFER

### ORDER

It appearing to this Court from the declaration of [name], counsel for defendant, that there are in your possession or under your control certain items relevant to this action, and good cause appearing therefor;

IT IS HEREBY ORDERED that the District Attorney of LOS ANGELES County make available to defense counsel and/or his representative on or before the hour of \_\_\_\_\_ on \_\_\_\_\_, 19\_\_\_\_, each of the items ordered by this Court as indicated above.

IT IS FURTHER ORDERED that this Order be deemed a continuing and on-going order through the completion of trial, so that any items granted by this order, which are actually or constructively obtained by or become known to the District Attorney of Los Angeles County or any of his deputies, investigators, employees, or agents after initial compliance with this Order has been made, shall also be made available forthwith to defense counsel.

IT IS FURTHER ORDERED that the District Attorney of Los Angeles County or any of his deputies, investigators, employees, or agents, and any police or sheriff's department or other state or federal law enforcement agency, shall preserve each of the items ordered by this Court until defense counsel or his investigator has had a reasonable opportunity to inspect and copy them.

Failure to comply with the above Order may be punishable by contempt or court.

DATED:

JUDGE OF THE SUPERIOR COURT

NORWALK CALIFORNIA;

WEDNESDAY, JANUARY 24, 1990\*

10:25 A.M.

DEPARTMENT SE J      HON. C. ROBERT  
SIMPSON, JR., JUDGE

APPEARANCES:

THE DEFENDANT WITH HIS COUNSEL,  
RALPH SEIFER, DEPUTY PUBLIC DEFENDER  
OF LOS ANGELES COUNTY; THE PEOPLE  
BEING REPRESENTED BY JAMES FAGAN,  
DEPUTY DISTRICT ATTORNEY OF LOS  
ANGELES COUNTY, THE FOLLOWING  
PROCEEDING WERE HELD:

(KATHLEEN H. ADAMS, OFFICIAL  
REPORTER.)

THE COURT: LET THE RECORD SHOW THAT  
MR. ROBBINS IS IN THE COURTROOM.

LEE ROBBINS, IS THAT YOUR TRUE AND CORRECT NAME?

THE DEFENDANT: YES, SIR.

THE COURT: MR. ROBBINS IS REPRESENTED BY THIS ATTORNEY, MR. SEIFER OF THE PUBLIC DEFENDER'S OFFICE, AND MR. FAGAN OF THE DISTRICT ATTORNEY'S OFFICE IS REPRESENTING THE PEOPLE.

MR. FAGAN.

MR. FAGAN: YOUR HONOR, CRIMINAL PROCEEDINGS HAVE BEEN SUSPENDED. WE ARE AWAITING THE ARRIVAL OF THE REPORTS FROM THE TWO DOCTORS, WHICH APPARENTLY HAVE NOT COME TO THE COURT FILE AS OF YET. I DON'T KNOW THAT WE CAN DO ANYTHING ABOUT THIS MATTER UNTIL THOSE REPORTS ARE FORWARDED.

THE COURT: CRIMINAL PROCEEDINGS HAVE BEEN SUSPENDED?

MR. FAGAN: YES, YOUR HONOR.

THE COURT: HOW LONG AGO WERE THE REPORTS REQUESTED?

MR. SEIFER: WELL, YOUR HONOR, JUDGE TORRIBIO DECLARED A DOUBT ON DECEMBER 19TH IF MY FILE IS CORRECT. I HAVE JUST SPOKEN WITH MR. ROBBINS.

UNDER 1368(A), HE IS TO BE SEEN BY TWO PSYCHIATRISTS. HE HAS BEEN SEEN ONLY BY ONE. I DON'T KNOW -- HE DOESN'T RECALL THE GENTLEMAN'S NAME. HE SAYS IT WAS AN OLDER MAN BY --

THE COURT: I WOULD BE INCLINED TO AGREE WITH MR. FAGAN THERE IS PROBABLY NOTHING WE CAN DO UNTIL WE GET THAT OTHER REPORT IN AND WE SHOULD PROBABLY CONTINUE THE MATTER FOR A COUPLE OF WEEKS.



MR. SEIFER: APPARENTLY WE DON'T HAVE EITHER REPORT AND HE HAS ONLY BEEN BY ONE OF THE TWO DOCTORS.

THE COURT: NEITHER REPORT IS IN?

MR. SEIFER: NEITHER.

THE COURT: WHAT IS YOUR SUGGESTION?

MR. FAGAN: PERHAPS MR. SEIFER CAN CONTACT THE DOCTORS.

MR. SEIFER: I PREFER TO HAVE THE CLERK CONTACT THE DOCTORS IF THAT'S NOT --

THE CLERK: YOUR HONOR, I HAVE GOT ENOUGH WORK TO DO.

THE COURT: YOU RATHER HAVE COUNSEL DO IT?

THE CLERK: YES, SIR.

MR. SEIFER: ALL RIGHT.

I WILL CONTACT THE DOCTORS. I WILL HAVE TO GET THEIR NAMES OUT OF THE COURT FILE, BUT I WILL DO THAT.

THE COURT: SHOULD WE PUT IT OVER FOR 30 DAYS?

MS. FAGAN: I WOULD PREFER, YOUR HONOR, LET'S SAY THREE WEEKS. THAT SHOULD BE ENOUGH.

THE COURT: ALL RIGHT.

THIS MATTER IS CONTINUED FOR THE RECEIPT OF DOCTORS' REPORTS UNTIL FEBRUARY 14TH, 1990.

MR. SEIFER: YOUR HONOR, THERE IS ONE OTHER THING IN THIS CASE. WE HAVE HAD A NUMBER OF MARSDEN MOTIONS. I DON'T KNOW IF THIS COURT IS ACQUAINTED WITH A MARSDEN MOTION.

THE COURT: YES.

MR. SEIFER: OKAY.

AT THE LAST APPEARANCE HERE ON DECEMBER 19TH, WE HAD A MARSDEN MOTION. AND IN CONJUNCTION WITH THAT, ONE OF THE

ITEMS THAT -- ONE OF THE AREAS THAT MR. ROBBINS HAD SOME DIFFICULTY WITH WAS THE FACT THAT I HAD NOT FILED A FORMAL DISCOVERY MOTION ON HIS BEHALF.

I DISCUSSED THE MATTER WITH JUDGE TORRIBIO AT THAT TIME. I TOLD JUDGE TORRIBIO THAT THE POLICY HERE IN NORWALK, DISTRICT ATTORNEYS -- IT IS KIND OF UNWRITTEN POLICY, BUT I'VE ALWAYS -- WHENEVER THERE HAS BEEN SOME DIFFICULTY WITH DISCOVERY, THE DISTRICT ATTORNEY HAS SAID THAT I CAN COME TO THEIR OFFICE AND LOOK THROUGH THEIR FILE.

THE COURT: DO YOU WANT THE DISTRICT ATTORNEY TO BE EXCUSED DURING THIS DISCUSSION?

MR. SEIFER: NO, YOUR HONOR, ABSOLUTELY NOT.

I EXPLAINED TO JUDGE TORRIBIO THAT MR. FAGAN WAS THE DISTRICT ATTORNEY ON MR. ROBBINS' CASE AND MR. FAGAN HAS TOLD ME -- AND I HAVE THE HIGHEST REGARD FOR MR. FAGAN AND WHATEVER HE HAS TO SAY. MR. FAGAN HAS TOLD ME THAT I HAVE EVERYTHING THAT HE HAS IN CONNECTION WITH THIS CASE.

I EXPLAINED THAT TO JUDGE TORRIBIO, AND I HAVE NO REASON TO DOUBT THAT AND I AM NOT SUGGESTING OTHERWISE.

JUST AS A FORMALITY, JUDGE TORRIBIO SUGGESTED I FILE A DISCOVERY MOTION. I HAVE GIVEN JIM FAGAN A COPY OF THAT AND I HAVE A COPY HERE FOR THE COURT.

MR. FAGAN: YOUR HONOR, I HAVE RECEIVED THE DISCOVERY MOTION. I HAVE REVIEWED IT AND I WOULD CONCEDE THAT THE DEFENDANT IS ENTITLED TO EVERYTHING

THE DEFENDANT IS ENTITLED TO EVERYTHING THAT IS REQUESTED IN THE DISCOVERY MOTION.

I WOULD INDICATE FOR THE RECORD AT THIS POINT IN TIME I HAVE GIVEN MR. SEIFER EVERYTHING THAT I HAVE THAT WOULD BE COVERED IN THE DISCOVERY MOTION.

ADDITIONALLY, FOR THE RECORD, I AM SEEKING SOME ADDITIONAL INVESTIGATION THAT I HAVE NOT RECEIVED YET; AND AT SUCH TIME THAT I DO, I WILL PROVIDE A COPY TO MR. SEIFER.

THE COURT: VERY WELL.

MR. SEIFER: I ACCEPT THAT REPRESENTATION COMPLETELY, YOUR HONOR. THAT'S FINE.

MR. SEIFER: THREE WEEKS FROM TODAY, YOUR HONOR?

THE COURT: THREE WEEKS FROM TODAY IS FEBRUARY 14TH.

MR. SEIFER: AND THE 2-6 JURY TRIAL DATE WILL GO OFF CALENDAR THEN, YOUR HONOR?

MR. FAGAN: IT WILL HAVE TO BECAUSE CRIMINAL PROCEEDINGS HAVE BEEN SUSPENDED.

THE COURT: YES, THE CRIMINAL PROCEEDINGS SUSPENDED.

DO WE HAVE A TIME WAIVER?

MR. FAGAN: WE DON'T NEED ONE, YOUR HONOR, BECAUSE PROCEEDINGS HAVE BEEN SUSPENDED.

THE COURT: ALL RIGHT.

MR. SEIFER: I WILL MAKE AN EFFORT TO REACH BOTH PSYCHIATRISTS TODAY, YOUR HONOR.



THE COURT: VERY GOOD. THANK YOU,  
MR. SEIFER.

MR. SEIFER: THANK YOU, SIR.

THE COURT: YOU ARE REMANDED TO  
CUSTODY, MR. ROBBINS.

(AT 10:30 A.M., THE PROCEEDINGS WERE  
CONTINUED TO WEDNESDAY,  
FEBRUARY 14, 1990, AT 9:00 A.M.)

NORWALK, CALIFORNIA

THURSDAY, MARCH 1, 1990\*

1:47 P.M.

DEPARTMENT SE J      HON. C. ROBERT  
                             SIMPSON, JR., JUDGE

(APPEARANCES AS HERETOFORE NOTED.)

THE COURT: CALENDAR ITEM 210, IN THE  
MATTER OF LEE ROBBINS.

MR. ROBBINS IS IN CUSTODY. BRING  
HIM OUT.

(THE DEFENDANT ENTERS THE  
COURTROOM.)

THE COURT: MR. SEIFER, I NEED TO TAKE  
ANOTHER LOOK AT THE TWO LETTERS.

MR. SEIFER: YES, YOUR HONOR.

YOUR HONOR, I PREVIOUSLY GAVE A  
COPY OF THE LETTER FROM DR. EISENBERG TO  
JUDGE TORRIBIO. THAT WAS DATED JANUARY

10TH. I DON'T KNOW IF THAT IS THE ONE THE COURT HAS.

THE COURT: NO. I SAW THE SHORTER ONE THIS MORNING.

MR. SEIFER: FROM DR. MEAD?

THE COURT: YES.

MR. SEIFER: I HAVE THE ONE HERE FROM DR. EISENBERG. I DON'T KNOW IF MR. FAGAN HAS SEEN THIS OR NOT.

MR. FAGAN: IT'S FINE. SUBMIT IT.

THE COURT: GIVE ME JUST A MOMENT.

VERY WELL.

I HAVE READ THE LETTER DATED JANUARY 10 FROM DR. MARVIN EISENBERG ADDRESSED TO JUDGE TORRIBIO. I BELIEVE THIS MORNING THE LETTER I READ WAS FROM DR. MEAD.

MR. FAGAN: YOUR HONOR, IT IS MY UNDERSTANDING THAT MR. ROBBINS WISHES

TO SUBMIT THE RULING AS TO WHETHER OR NOT HE IS COMPETENT TO STAND TRIAL ON THE COURT READING THE REPORTS OF THE TWO DOCTORS.

IS THAT WHAT YOU WISH TO DO, MR. ROBBINS?

THE DEFENDANT: I AM SORRY, I DIDN'T HEAR.

MR. FAGAN: I SAID YOU ARE HERE TO DETERMINE WHETHER OR NOT YOU ARE COMPETENT TO STAND TRIAL OR NOT MENTALLY COMPETENT. IT IS MY UNDERSTANDING YOU WISH TO HAVE THE COURT READ THE REPORTS OF THE TWO DOCTORS AND MAKE A DETERMINATION BASED ON READING THOSE TWO REPORTS.

IS THAT WHAT YOU WANT TO DO?

THE DEFENDANT: THAT WOULD BE FINE, YOUR HONOR.

MR. FAGAN: MR. ROBBINS, YOU HAVE A RIGHT TO HAVE A JURY TRIAL TO DETERMINE WHETHER YOU ARE COMPETENT TO STAND TRIAL.

DO YOU UNDERSTAND THAT?

THE DEFENDANT: YES, SIR.

MR. FAGAN: DO YOU GIVE UP THAT RIGHT?

THE DEFENDANT: YES, SIR.

MR. FAGAN: YOU HAVE A RIGHT TO CONFRONT AND CROSS-EXAMINE THE WITNESSES AGAINST YOU. THAT MEANS YOU HAVE A RIGHT TO HAVE THESE TWO DOCTORS COME INTO COURT AND TESTIFY IN FRONT OF YOURSELF AND YOUR ATTORNEY.

DO YOU UNDERSTAND THAT RIGHT?

THE DEFENDANT: YES, SIR.

MR. FAGAN: AND DO YOU GIVE UP THAT RIGHT?

THE DEFENDANT: YES, SIR.

MR. FAGAN: DO YOU AGREE THE JUDGE CAN READ THE TWO REPORTS AND MAKE THIS DECISION BASED ON THE MATERIAL BASED IN THOSE REPORTS?

THE DEFENDANT: YES, I DO.

MR. FAGAN: PEOPLE JOIN IN ALL THE WAIVERS, YOUR HONOR.

THE COURT: VERY WELL.

THE COURT FINDS THAT MR. ROBBINS HAS BEEN DULY ADVISED OF THIS RIGHTS WITH RESPECT TO A JURY TRIAL FOR DETERMINATION OF THE ISSUE BEFORE THE COURT AND HAS KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WAIVED AND GIVEN UP THOSE RIGHTS.

THEREFORE, THE COURT WILL ACCEPT THOSE WAIVERS AND ADMIT INTO THE RECORDS OF THE PROCEEDING THE



DEFENDANT'S STATED WISH THAT THE MATTER BE RESOLVED BY THE COURT.

MR. SEIFER, DO YOU HAVE ANYTHING FURTHER IN ADDITION TO THE TWO LETTERS THAT THE COURT HAS BEFORE IT AND HAS READ?

MR. SEIFER: NO, YOUR HONOR, I DON'T HAVE ANYTHING FURTHER ON THIS ISSUE. I AM PREPARED TO SUBMIT ON WHAT EISENBERG AND MEAD SAID, ALTHOUGH PARENTHETICALLY I WOULD LIKE TO SAY I SPOKE TO DR. EISENBERG AFTER I RECEIVED A COPY OF THIS REPORT SOMEWHAT BELATEDLY AND SUGGESTED TO DR. EISENBERG THAT ALTHOUGH I WAS ENLIGHTENED BY HIS COMMENTS AS TO THIS SUMMARY OF MR. ROBBINS' STATEMENTS ABOUT HIS LAWYER'S COMPETENCE OR INCOMPETENCE, THAT I WASN'T QUITE SURE THAT THE REPORT

REACHED THE ISSUES THAT JUDGE TORRIBIO WAS CONCERNED WITH BACK IN DECEMBER.

BUT IN ANY EVENT, I DON'T PERSONALLY HAVE MUST DOUBT ABOUT MR. ROBBINS' COMPETENCE.

THE COURT: MR. FAGAN, DO YOU HAVE ANYTHING TO SUBMIT IN ADDITION TO THE TWO LETTERS?

MR. FAGAN: NO, YOUR HONOR. I HAVE REVIEWED THE REPORTS AND IT APPEARS BOTH OF THEM REFLECT THE DEFENDANT IS PERFECTLY COMPETENT TO STAND TRIAL.

THE COURT: LET ME JUST INQUIRE OF MR. ROBBINS.

MR. SEIFER: CERTAINLY, YOUR HONOR.

THE COURT: IF I MAY.

MR. ROBBINS, YOU UNDERSTAND THAT YOU ARE CHARGED HERE WITH THE CRIME OF MURDER.

THE DEFENDANT: YES, SIR.

THE COURT: AND THAT THE PEOPLE ARE GOING TO BRING YOU TO TRIAL BEFORE A JURY FOR THEM TO DETERMINE THE TRUTH OR LACK OF TRUTH OF THOSE CHARGES.

YOU ARE GENERALLY AWARE OF THAT?

THE DEFENDANT: YES, SIR.

THE COURT: THAT YOU HAVE A RIGHT AT THAT TRIAL TO CONFRONT THE WITNESSES AGAINST YOU, YOU HAVE A RIGHT AT THAT TRIAL TO REMAIN SILENT.

AND DO YOU UNDERSTAND THOSE RIGHTS THAT YOU HAVE IN CONNECTION WITH THAT TRIAL?

THE DEFENDANT: YES, SIR, I DO.

THE COURT: YOU UNDERSTAND THAT THE CONSEQUENCES OF YOUR BEING FOUND GUILTY OF THE CRIME AS CHARGED ARE

SERIOUS TO THE EXTENT OF A POSSIBLE SENTENCE OF DEATH --

MR. FAGAN: NO, YOUR HONOR, IT IS NOT A DEATH CASE.

THE COURT: IT IS NOT THAT CRIME?

MR. FAGAN: THERE ARE NO SPECIAL CIRCUMSTANCES ALLEGED IN THIS CASE.

THE COURT: THERE ARE NO SPECIAL CIRCUMSTANCES?

MR. FAGAN: MAXIMUM PUNISHMENT WOULD BE OF 27 YEARS TO LIFE IMPRISONMENT.

THE COURT: TWENTY-SEVEN TO LIFE.

DO YOU UNDERSTAND THE CONSEQUENCES THEN, YOU COULD BE SENTENCED FROM 27 TO LIFE IN THE PENITENTIARY?

THE DEFENDANT: YES, SIR.

THE COURT: ALL RIGHT.

DO YOU FEEL YOURSELF GENERALLY ABLE TO ASSIST YOUR COUNSEL IN THE PREPARATION OF YOUR DEFENSE?

THE DEFENDANT: YES, SIR, I DO.

I'VE BEEN ATTEMPTING TO, BUT MR. SEIFER AND I HAVE HAD PROBLEMS SINCE HE WAS APPOINTED TO THE CASE AND I'D LIKE TO REQUEST AGAIN THAT I BE APPOINTED A NEW ATTORNEY IN THIS MATTER.

MR. FAGAN: WELL, IF I COULD, YOUR HONOR, THAT IS AN ISSUE THAT IS SEPARATE AND DISTINCT FROM THE ONE WE HAVE BEFORE US.

THE COURT: YES. MR. ROBBINS, THAT IS AN ISSUE -- AND YOU MIGHT JUST PUT THE NAME IN YOUR MIND AND YOU MAY WISH TO BRING IT UP FOR FURTHER CONSIDERATION. THAT IS WHAT IS KNOWN AS MARSDEN HEARING, M-A-R-S-D-E-N.

YOU WILL HAVE A RIGHT AT ANY TIME THROUGH THE COURSE OF THESE PROCEEDINGS, OR UP TO A CERTAIN POINT IN THESE PROCEEDINGS AT LEAST, TO ASK THE COURT TO SUBSTITUTE MR. SEIFER AND TO MAKE THE APPOINTMENT OF ANOTHER APPOINTED COUNSEL TO REPRESENT YOU. I AM NOT REPRESENTING TO YOU AT THIS TIME THAT I WILL EITHER GRANT OR DENY THAT MOTION, BUT YOU HAVE A RIGHT TO MAKE THAT MOTION.

FOR THESE PURPOSES, I SIMPLY WANT TO DETERMINE WHETHER YOU ARE COMPETENT TO GO FORWARD TO STAND TRIAL FOR THE CRIME AS CHARGED.

THE DEFENDANT: YES, SIR.

THE COURT: I WOULD ALSO ENCOURAGE BOTH YOU AND MR. SEIFER TO MAKE ARRANGEMENTS TO GET TOGETHER AS SOON



AS POSSIBLE. I WOULD ENCOURAGE YOU TO BE SURE YOU'VE TOLD MR. SEIFER EVERYTHING YOU KNOW, GIVE HIM EVERY ASSISTANCE THAT YOU POSSIBLY CAN IN THE PREPARATION OF YOUR DEFENSE.

AND I WOULD ENCOURAGE MR. SEIFER TO TRY TO FIND THE TIME IN HIS BUSY CALENDAR, AND HE IS BUSY AND ALL ATTORNEYS ARE VERY BUSY, TO GET WITH YOU AND TO TALK WITH YOU ABOUT THIS CASE AT THIS EARLIEST OPPORTUNITY.

BUT FOR NOW, AS I SAY, I AM SIMPLY TRYING TO DETERMINE WHETHER YOU ARE COMPETENT TO STAND TRIAL. YOU UNDERSTAND THAT JUDGE TORRIBIO DID DECLARE A DOUBT ABOUT THAT AT SOME PRIOR TIME AND THAT IS WHY TWO PSYCHIATRISTS WERE APPOINTED TO INTERVIEW YOU.

AND YOU RECALL HAVING BEEN INTERVIEWED BY BOTH DR. MEAD AND DR. EISENBERG?

THE DEFENDANT: YES, SIR, I DO.

THE COURT: WHERE WERE THOSE INTERVIEWS CONDUCTED?

THE DEFENDANT: ONE WAS HERE IN L.A. AND IN DEPARTMENT 95 SUPERIOR COURT, AND THE OTHER WAS AT WAYSIDE MEDIUM NORTH FACILITY.

THE COURT: ALL RIGHT.

WHAT WAS YOUR FEELING, WHAT WAS YOUR REACTION TO THOSE INTERVIEWS?

THE DEFENDANT: IT WAS JUST BASICALLY LIKE TALKING TO ANY OTHER PSYCHIATRIST, I GUESS, EXCEPT I DIDN'T HAVE A COUCH TO LAY ON. IT WAS MY CHILDHOOD HISTORY, EDUCATION HISTORY, WORK HISTORY AND THEN THEY ASKED, YOU KNOW, QUESTIONS

ABOUT THE CASE AND WHAT WAS GOING ON WITH IT AND --

THE COURT: ALL RIGHT.

DID YOU FIND THAT YOU UNDERSTOOD THEIR QUESTIONS?

THE DEFENDANT: YES, SIR.

THE COURT: AND YOU FOUND THAT YOU WERE ABLE TO ARTICULATE ANSWERS THAT WERE SATISFACTORY TO YOU TO THOSE QUESTIONS?

THE DEFENDANT: YES, SIR. I DIDN'T HAVE ANY TROUBLE COMMUNICATING OR CONVEYING MY THOUGHTS TO EITHER DOCTOR.

THE COURT: SO BETWEEN YOU AND EITHER DOCTOR, THERE WERE NO COMMUNICATION PROBLEMS THAT YOU WERE AWARE OF AT LEAST?

THE DEFENDANT: NO, SIR, THERE WEREN'T.

THE COURT; WELL, THE COURT IS PREPARED TO MAKE FINDINGS AND RULE HERE.

AS I HAVE PREVIOUSLY INDICATED, I HAVE READ BOTH LETTERS, ONE FROM DR. MEAD AND ONE FROM DR. EISENBERG, REGARDING THE QUESTION BEFORE THE COURT, WHICH IS WHETHER THIS DEFENDANT IS MENTALLY COMPETENT TO STAND TRIAL FOR A CRIMINAL OFFENSE.

BASED UPON MY READING OF THOSE LETTERS, BASED UPON STATEMENTS OF COUNSEL AND BASED UPON MY OWN INQUIRY HERE OF MR. ROBBINS AT THIS PROCEEDING, THE COURT WILL MAKE THE FOLLOWING FINDINGS:

THIS DEFENDANT, LEE ROBBINS, IS IN MY OPINION CAPABLE OF UNDERSTANDING THE NATURE AND THE PURPOSE OF THE

PROCEEDINGS AGAINST HIM AND COMPREHENDS THIS STATUS AND HIS CONDITION WITH REFERENCE TO THESE PROCEEDINGS.

HE UNDERSTANDS THE CONSEQUENCES OF AN ADVERSE FINDING BY THE JURY AGAINST HIM IN THESE PROCEEDINGS. HE APPEARS TO THIS COURT TO BE ABLE TO ASSIST HIS ATTORNEY IN THE CONDUCT OF HIS OWN DEFENSE.

THEREFORE, THE COURT WILL FIND THAT LEE ROBBINS IS MENTALLY COMPETENT TO STAND TRIAL FOR CRIMINAL OFFENSE BY THE PREPONDERANCE OF THE EVIDENCE. AND, THEREFORE, THE COURT WILL ORDER THAT CRIMINAL PROCEEDING BE RESUMED IN THIS CASE.

MR. SEIFER: YOUR HONOR, MR. ROBBINS POINTED OUT TO ME THAT HE WAS IN FACT

ARRAIGNED IN THIS DEPARTMENT ON DECEMBER 19TH AND THAT JUDGE TORRIBIO APPARENTLY DECLARED A DOUBT THE NEXT DAY ON DECEMBER 20TH.

THE COURT: I SEE.

MR. SEIFER: I AM NOT QUITE SURE WHAT THE -- IS THAT CORRECT?

THE CLERK: YES.

MR. SEIFER: SO I WOULD SUGGEST THT THIS IS PROBABLY DAY 2 OF 60.

MR. FAGAN: I WOULD JUST REQUEST WE SET THE MATTER ON OR ABOUT THE 49TH DAY FROM TODAY.

THE COURT: DO YOU WANT A PRETRIAL?

MR. FAGAN: THERE IS NO POINT IN PRETRIAL IN THIS CASE.

MR. SEIFER: I DON'T THINK A PRETRIAL WILL MAKE ANY DIFFERENCE.



I WILL BE FILING A 995 IN THIS CASE,  
YOUR HONOR.

THE COURT: ALL RIGHT.

THAT CAN BE FILED AT ANY TIME.

MR. SEIFER: YES, SIR.

THE COURT: 49 DAYS FROM TODAY IS  
APRIL 19TH. 47 DAYS FROM --

MR. FAGAN: WE CAN SET IT APRIL 19TH,  
YOUR HONOR, BUT THAT WILL BE THE 50TH  
DAY.

THE COURT: IF THIS IS 2 OF 60, APRIL 19TH  
WILL BE 51. IS THIS -- 50.

MR. FAGAN: 50.

THE COURT: APRIL 20 WILL BE SET AS THE  
DATE OF TRIAL AND THAT WILL BE DEEMED TO  
BE 50 OF 60.

ALL RIGHT.

MR. FAGAN: THANK YOU, YOUR HONOR.

MR. SEIFER: YOUR HONOR, THERE IS ONE  
OTHER MATTER IF I MAY.

AS THE COURT INDICATED, MR. ROBBINS  
CAN MAKE A MARSDEN MOTION. THERE WAS A  
MARSDEN MOTION MADE AT BELLFLOWER AT  
THE PRELIMINARY HEARING ON OCTOBER 19TH  
AND I BELIEVE THERE WAS A MARSDEN  
MOTION MADE TO JUDGE TORRIBIO ON THE  
19TH OF DECEMBER OR THE 20TH OF  
DECEMBER. THERE HAVE BEEN AT LEAST TWO  
PRIOR MARSDEN MOTIONS.

HOWEVER, MR. ROBBINS HAS ASKED ME  
AGAIN TODAY IF THIS COURT WOULD HEAR  
ANOTHER MARSDEN MOTION. I TOLD HIM I  
WOULD ASK THE COURT TO DO THAT.

THE COURT: WELL, THE DEFENDANT HAS  
A RIGHT TO BE HEARD ON THAT MOTION. I  
WOULD NOT BE ABLE TO HEAR THAT MOTION

TODAY, BUT I WOULD BE WILLING TO HEAR THAT MOTION A WEEK FROM TODAY.

THE DEFENDANT: THANK YOU, YOUR HONOR.

MR. SEIFER: THAT WILL BE FINE, YOUR HONOR.

THE COURT: THAT WILL BE THE 8TH.

MR. SEIFER: YOUR HONOR, I HAVE A DENTAL APPOINTMENT EARLY ON THE MORNING OF THE 8TH. I WONDER IF WE CAN PUT THAT ON THE 1:30 CALENDER?

THE COURT: I WOULD RATHER MAKE IT THE 7TH.

MR. SEIFER: OKAY.

MR. FAGAN: YOUR HONOR, I WON'T EVEN BE PRESENT.

THE COURT: YOU WON'T EVEN BE HERE.

MR. FAGAN: SO IT MAKES NO DIFFERENCE TO ME.

THE COURT: UNLESS WE NEED YOU FOR SOME REASON.

MR. FAGAN: I WILL NOT BE. I WILL BE OUT OF TOWN.

MR. SEIFER: ORDINARILY THE PEOPLE ARE NOT PRESENT.

MR. FAGAN: I AM EXCLUDED FROM THE MOTION ANYWAY.

THE COURT: UNLESS THERE IS SOME INFORMATION WE NEED FROM YOU.

MR. FAGAN: IF THAT IS NEEDED, SOMEBODY ELSE CAN FILL IN.

MR. SAMOIAN: MISS GRAVES WILL BE HERE NEXT WEEK. SHE CAN DO THAT.

THE COURT: LET'S HEAR THAT MOTION ON THE MORNING OF MARCH 7TH.

MR. SEIFER: BE FINE, YOUR HONOR.

THE DEFENDANT: THANK YOU SIR.

THE COURT: ALL RIGHT. VERY WELL.

THE COURT: YOUR MATTERS ARE  
CONCLUDED. YOU MAY BE EXCUSED. THANK  
YOU, MR. FAGAN.

YOU ARE REMANDED TO CUSTODY  
THEN, MR. ROBBINS.

(AT 2:05 P.M., THE PROCEEDINGS WERE  
CONTINUED TO WEDNESDAY, MARCH 7,  
1990, AT 9:00 A.M.)

DEPARTMENT SOUTHEAST J      HON. C. ROBERT  
SIMPSON, JR., JUDGE

THE PEOPLE OF THE STATE )  
OF CALIFORNIA, ) NO. A481636  
 )  
Plaintiff, )  
 )  
v. )  
 )  
LEE ROBBINS, )  
 )  
Defendant. )

## REPORTER'S TRANSCRIPT ON APPEAL

MARSDEN HEARING

WEDNESDAY, MARCH 7, 1990

**APPEARANCES:**

FOR THE DEFENDANT:

WILBUR F. LITTLEFIELD,  
PUBLIC DEFENDER  
BY: RALPH SEIFER, DEPUTY  
19-513 CRIMINAL COURTS BUILDING  
210 WEST TEMPLE STREET  
LOS ANGELES, CALIFORNIA 90012

KATHLEEN H. ADAMS,  
CSR #2853  
OFFICIAL REPORTER



NORWALK, CALIFORNIA;

WEDNESDAY, MARCH 7, 1990\*

1:55 P.M.

DEPARTMENT SE J      HON. C. ROBERT  
SIMPSON, JR., JUDGE

APPEARANCES:

THE DEFENDANT WITH HIS COUNSEL,  
RALPH SEIFER, DEPUTY PUBLIC DEFENDER  
OF LOS ANGELES COUNTY; NO DEPUTY  
DISTRICT ATTORNEY OF LOS ANGELES  
COUNTY BEING PRESENT.

(KATHLEEN H. ADAMS, OFFICIAL  
REPORTER.)

THE COURT: LET THE RECORD SHOW THAT  
LEE ROBBINS IS PRESENT IN COURT WITH HIS  
ATTORNEY, DEPUTY PUBLIC DEFENDER RALPH  
SEIFER.

THE MATTER IS BEFORE THE COURT  
THIS AFTERNOON I AM ADVISED FOR THE  
PURPOSE OF YOUR REQUESTING THAT I  
APPOINT A NEW ATTORNEY TO REPRESENT  
YOU, MR. ROBBINS.

IS THAT WHAT YOU WANT ME TO DO?

THE DEFENDANT: YES, SIR.

THE COURT: WHY DO YOU WANT ME TO  
DO THAT?

THE DEFENDANT: WELL, YOUR HONOR,  
THIS IS THE FOURTH MARSDEN HEARING THAT  
I HAVE HAD. AT THE FIRST ONE IN MUNICIPAL  
COURT, COMMISSIONER TIPTON SAID HE DIDN'T  
HAVE ANYONE BETTER TO REPLACE MR.  
SEIFER WITH. THE SECOND HEARING,  
COMMISSIONER TIPTON SAID I HAD TO SHOW  
THE PUBLIC DEFENDER TO BE INCOMPETENT.

THE THIRD HEARING, THIS TIME IN  
SUPERIOR COURT HERE IN NORWALK, JUDGE

TORRIBIO SUSPENDED PROCEEDINGS PENDING THE OUTCOME OF THE DOCTOR'S EXAM.

BOTH DOCTORS HAVE REVIEWED MY CASE AND EXAMINED ME THOROUGHLY AND CONCLUDED I AM SANE AND COMPETENT. I ALSO BELIEVE THE DOCTORS MADE A RECOMMENDATION TO THE COURT REGARDING MR. SEIFER.

YOUR HONOR, I HAVE ANOTHER ATTORNEY WHOM I CAN TRUST AND WORK WITH AND WHO IS WILLING TO HANDLE MY CASE IF THE COURT WOULD PLEASE APPOINT HIM.

MR. SEIFER IS THE THIRD PUBLIC DEFENDER I HAVE HAD. THE FIRST TWO WERE REPLACED AFTER TELLING ME THE CASE WOULD BE DISMISSED. AND THEN I GOT MR. SEIFER, WHO SAYS I SHOULD TAKE THE DEAL

THE D.A. WANTS ME TO SET BECAUSE I AM GUILTY UNTIL I CAN PROVE I AM INNOCENT.

THE COURT: WHAT IS THE BASIC CHARGE, MR. ROBBINS? WHAT ARE YOU CHARGED WITH?

THE DEFENDANT: FIRST DEGREE MURDER, SIR.

THE COURT: OH, YES. ALL RIGHT.

AND I REMEMBER THAT YOU WERE HERE A WEEK OR SO AGO AND I FOUND YOU COMPETENT TO STAND TRIAL.

THE DEFENDANT: YES, SIR.

THE COURT: ALL RIGHT.

GO AHEAD.

THE DEFENDANT: I BELIEVE THERE IS A CONFLICT OF INTEREST DUE TO CLOSE PERSONAL RELATIONSHIP BETWEEN MR. SEIFER AND MR. FAGAN. IT WAS NECESSARY FOR

JUDGE TORRIBIO TO TELL MR. SEIFER TO FILE A DISCOVERY MOTION.

ALSO, MR. SEIFER WAS KIND ENOUGH TO BRING IN EVIDENCE, A TAPED THREAT AGAINST ME, THAT I HAD SPECIFICALLY TOLD HIM SUPPRESS BECAUSE IT WAS OBTAINED IN AN ILLEGAL SEARCH.

I HAVE REPEATEDLY REQUESTED COPIES OF POLICE REPORTS, TRANSCRIPTS, AND DEPOSITIONS, AND I HAVE BEEN REFUSED BY MR. SEIFER. MR. SEIFER HAS TOLD ME THAT I HAVE NO DEFENSE; AND UNTIL HE FEELS OTHERWISE, THERE IS NOTHING HE CAN DO.

HE HAS ALSO SAID THAT HE WAS GOING TO FILE A MOTION TO DISMISS, BUT HAS NOT DONE SO, LATER SAYING THAT THE D.A. WILL ONLY REFILE IF THE CASE IS DISMISSED.

I TOLD MR. SEIFER THAT I WANTED A LINE-UP BECAUSE MR. FAGAN HAD A WITNESS

WHO SAW SOMEONE NEAR THE SCENE OF THE MURDER ABOUT THE TIME OF THE MURDER. MR. SEIFER REFUSED. THE WITNESS, WHEN BROUGHT TO COURT, DID NOT IDENTIFY ME AS THE PERSON SHE SAW.

THE CRIME SCENE EVIDENCE INDICATES THAT THE MURDERER SHOULD HAVE BEEN WOUNDED. YET WHEN I ASKED MR. SEIFER TO HAVE THE DOCTORS VERIFY THAT I HAVE NOT BEEN WOUNDED, MR. SEIFER REFUSED.

I BELIEVE THE D.A. TAMPERED WITH THE EVIDENCE AND IS WITHHOLDING EVIDENCE IN THIS CASE. AT THE PRELIMINARY HEARING, MR. FAGAN DISPLAYED THE MURDER WEAPON NOT AS IT WAS OBTAINED WITH AN AIM-POINT-SIGHT SCOPE ON IT, BUT WITHOUT THE SCOPE AND ONE HANDGRIP WAS MISSING.

I BELIEVE THAT WAS DONE IN AN ATTEMPT TO MAKE THE MURDER WEAPON



LOOK LIKE THE WEAPON I HAD DESCRIBED TO MR. SEIFER AS HAVING HAD THAT NIGHT.

ON THE NIGHT THE MURDER OCCURRED, I WAS SHOWING TWO GUNS TO A NAVY WEAPONS EXPERT WHO MR. FAGAN BROUGHT TO COURT IN HOPES OF HAVING HIM IDENTIFY THE MURDER WEAPON AS THE ONE I HAD SHOWN TO HIM.

WHEN THE WITNESS MENTIONED THAT ONE HANDGRIP WAS MISSING, DETECTIVE JONES OPENED THE EVIDENCE BAG TO GET THE OTHER BROWN HANDGRIP. AT THIS POINT I SAW THE MISSING AIM-POINT-SIGHT SCOPE IN THE EVIDENCE BAG.

THE WITNESS THEN TOLD THE COURT THAT THE MURDER WEAPON WAS DIFFERENT THAN THE WEAPON THAT I HAD IN THAT THE MURDER WEAPON IS ALL BLUE WITH BROWN

GRIPS WHILE THE WEAPON I HAD WAS SILVER FRAMED BLACK GRIPS.

HE ALSO STATED I DID NOT LEAVE UNTIL SOMETIME AFTER 6:30, CLOSER TO 8:00 P.M. THAT NIGHT. THE MURDER OCCURRED AT 6:00 TO 6:15 P.M. ACCORDING TO THE CORONER OR 6:25 P.M. ACCORDING TO THE WITNESS WHO HEARD THE SHOTS.

BECAUSE OF THE INVOLVEMENT OF THE EX-MAYOR OF CERRITOS AND HIS SON IN THIS CASE, YOUR HONOR, I DO NOT WANT ANYONE CONNECTED WITH THE PUBLIC DEFENDER'S OFFICE TO REPRESENT ME.

THE VICTIM'S SISTER WORKS FOR THE SHERIFF'S DEPARTMENT AND THEY HAVE SEARCHED MY LIVING QUARTERS, MY STORAGE AREA, AND IMPOUNDED MY VEHICLE AND PERSONAL PROPERTY.

THE COURT: WHO WORKS FOR THE SHERIFF'S DEPARTMENT? THE VICTIM'S SISTER?

THE DEFENDANT: YES, SIR. AND THEY CONDUCTED THESE SEARCHES AND SEIZURES WITHOUT ANY WARRANTS. I WAS ALSO BROUGHT TO CALIFORNIA FROM ARKANSAS WITHOUT A GOVERNOR'S WARRANT.

BECAUSE OF THESE FACTS, YOUR HONOR, I AGAIN REQUEST THAT MR. SEIFER BE REMOVED FROM THE CASE AND THAT THE ATTORNEY I AM REQUESTING PLEASE BE APPOINTED.

THE COURT: WHO ARE YOU REQUESTING?

THE DEFENDANT: MR. RAND RUBIN OF LOS ANGELES, SIR. HE HAS BEEN BRIEFED ON THE CASE AND HE HAS OFFERED TO REPRESENT ME IN THE MATTER IF THE COURT WOULD APPOINT HIM.

THE COURT: MR. SEIFER, MR. ROBBINS HAS MADE SOME -- I MADE SOME QUICK NOTES HERE. MR. ROBBINS HAS MADE SEVERAL POINTS AND I WOULD LIKE TO HAVE JUST A BRIEF RESPONSE.

MR. SEIFER: YES, SIR.

THE COURT: WITH RESPECT TO YOUR RELATIONSHIP TO MR. FAGAN.

MR. SEIFER: YOUR HONOR, MR. ROBBINS CHARACTERIZED MY RELATIONSHIP WITH MR. FAGAN I THINK AS A CLOSE PERSONAL RELATIONSHIP. I KNOW MR. FAGAN ONLY PROFESSIONALLY.

I HAVE NEVER PLAYED GOLF WITH MR. FAGAN. HE WAS MARRIED OVER THE WEEKEND IF I UNDERSTAND CORRECTLY. I WAS NOT INVITED TO MR. FAGAN'S WEDDING.

I HAVE THE HIGHEST REGARD FOR JIM FAGAN PROFESSIONALLY. BUT MY DEALINGS

WITH FAGAN -- IF JIM FAGAN TELLS ME SOMETHING, I HAVE NOT THE SLIGHTEST DOUBT ABOUT HIS VERACITY OR THE ACCURACY OF WHAT HE SAYS.

I HAVE TRIED TO RELAY THAT TO MR. ROBBINS BECAUSE MR. FAGAN HAS MADE WHAT I CONSIDERED TO BE AN OFFER THAT IS CERTAINLY WORTH MR. ROBBINS SPENDING SOME TIME CONSIDERING AND I HAVE TRIED TO EMPHASIZE THAT IN MY DISCUSSIONS WITH HIM.

BUT IN TERMS OF A CLOSE PERSONAL RELATIONSHIP WITH MR. FAGAN, I THINK IT EXTENDS PROFESSIONALLY ONLY, SIR.

THE COURT: ALL RIGHT.

MR. ROBBINS MADE REFERENCE TO SEVERAL MOTIONS. ONE HE MENTIONED MOTION TO DISMISS. I ASSUME UNDER 1385.

HAS THAT BEEN SOMETHING THAT YOU DISCUSSED WITH MR. ROBBINS?

MR. SEIFER: NOT A 1385 MOTION, YOUR HONOR. I HAD MENTIONED TO MR. ROBBINS THAT I INTENDED TO FILE A 995 MOTION IN THIS MATTER. I ADVISED THE COURT AND MR. FAGAN OF THAT ON MARCH 1ST WHEN WE WERE HERE ON THE 1368 MATTER.

THERE WILL BE A 995 PREPARED AND FILED IN THIS CASE. I DON'T KNOW THAT THERE IS ANY GREAT URGENCY TO IT. IT WILL BE SOMETIME BETWEEN NOW AND THE 20TH OF APRIL WHEN THE CASE COMES UP ON THE 50TH DAY. I AM PRESENTLY WORKING ON IT.

IF MY SCHEDULE IS NOT COMPATIBLE WITH MR. ROBBINS, THEN I APOLOGIZE FOR THAT.

THE COURT: ALL RIGHT.



MR. ROBBINS ALSO MENTIONED  
POSSIBLE 1385 -- 1538.5 MOTION.

MR. SEIFER: YES, SIR. MR. ROBBINS ASKED  
TO SUPPRESS A TAPE THAT WAS A MESSAGE  
LEFT ON HIS TELEPHONE ANSWERING MACHINE  
I BELIEVE BY THE VICTIM. IT WAS A THREAT  
BY THE VICTIM THREATENING TO KILL MR.  
ROBBINS. I AM PARAPHRASING.

I HAVEN'T REVIEWED THE TRANSCRIPT  
OF THAT TAPE RECENTLY. BUT BASICALLY  
THAT'S -- IT WAS A MESSAGE LEFT BY THE  
VICTIM ON MR. ROBBINS'S ANSWERING  
MACHINE. IT WAS FOUND BY THE POLICE  
WHEN THEY SEARCHED HIS QUARTERS IN  
CONNECTION WITH HIS ARREST OR THE FILING  
OF THIS CASE EARLY IN 1989.

MR. ROBBINS FEELS THAT I SHOULD DO  
SOMETHING TO SUPPRESS THAT TAPE AS A  
RESULT OF AN ILLEGAL -- WHAT HE

CHARACTERIZES AS AN ILLEGAL SEARCH. IN  
MY VIEW WHETHER THE SEARCH WAS OR NOT  
ILLEGAL ISN'T THE QUESTION. IT WAS A  
THREAT FROM THE VICTIM AND I THINK IT  
MAY BE OF SOME RELEVANCE IN THIS CASE.

I HAVE NO INTENTION, AT LEAST AT  
THIS MOMENT, OF MOVING TO SUPPRESS A  
THREAT FROM THE VICTIM.

THE COURT: IF ANYTHING, THAT MIGHT  
VERY WELL BE FAVORABLE TO THE  
DEFENDANT.

MR. SEIFER: WELL, IT'S POSSIBLE, YOUR  
HONOR. I AM NOT QUITE SURE WHERE THIS  
CASE IS GOING. BUT IN MY JUDGMENT AT THIS  
TIME, I DON'T SEE ANY MERIT IN MOVING TO  
SUPPRESS IT.

THE COURT: ALL RIGHT.

WELL, WERE MR. ROBBINS'S QUARTERS  
SEARCHED WITH A WARRANT?

MR. SEIFER: I BELIEVE THE -- I AM NOT SURE, YOUR HONOR. I DON'T BELIEVE A WARRANT WAS OBTAINED, BUT I AM NOT CERTAIN OF THAT. I WOULD HAVE TO GO BACK THROUGH THE FILE.

THE COURT: IS THERE OTHER EVIDENCE THAT MIGHT BE THE SUBJECT OF SUPPRESSION?

MR. SEIFER: NO, SIR. ONLY THE TAPE.

THE COURT: ONLY THE TAPE. ALL RIGHT.

AND TACTICALLY THERE WOULD APPEAR TO BE A GENUINE QUESTION THERE AS TO WHETHER THAT TAPE SHOULD OR SHOULDN'T BE SUPPRESSED. ALL RIGHT.

MR. ROBBINS MENTIONED THAT HE HAS BEEN UNSUCCESSFUL IN GETTING FROM YOU COPIES OF CERTAIN OF BASIC DOCUMENTS, POLICE REPORT --

MR. SEIFER: THAT IS LARGELY TRUE, YES, SIR.

THE COURT: THE INFORMATION, ET CETERA.

MR. SEIFER: I GAVE MR. ROBBINS A COPY OF A SUPPLEMENTAL REPORT THAT WAS PROVIDED TO ME BY THE SHERIFF'S INVESTIGATORS. I HAVE NOT GIVEN HIM COPIES OF OTHER THINGS THAT I HAVE IN THE FILE. I HAVE NOT REFUSED TO LET HIM READ THOSE.

I HAVE BEEN TO THE COUNTY JAIL AT LEAST ONCE TO SEE MR. ROBBINS AND I WAS OUT AT WAYSIDE EITHER ONCE OR TWICE TO SEE HIM. WE HAVE HAD SOME EXTENSIVE DISCUSSIONS. HE HAS SEEN A LOT OF THE MATERIAL THAT I HAVE.

MY OWN PERSONAL POLICY, YOUR HONOR, WITH REGARD TO GIVING COPIES OF THIS MATERIAL TO PEOPLE IN CUSTODY IS THAT ALMOST INVARIABLY THE NEXT THING

THAT HAPPENS IS I GET A CALL FROM THE DISTRICT ATTORNEY ADVISING THAT THERE IS A SNITCH DOWN AT THE COUNTY JAIL OR OUT AT WAYSIDE WHO HAS BEEN TALKED TO BY MY CLIENT AND MY CLIENT HAS VIRTUALLY CONFIRMED EVERYTHING THAT HAS BEEN ALLEGED IN THE CASE.

AND BASICALLY WHAT'S HAPPENED IS SOMEBODY HAS GOTTEN A HOLD OF THESE DOCUMENTS AND READ THEM AND THEN GONE TO THE SHERIFF AND TRIED TO CUT HIMSELF A BETTER DEAL.

SO MY OWN PERSONAL POLICY IS THAT IT IS EASIER TO CONTROL THE CASE WITHOUT HAVING THAT KIND OF INTERFERENCE. AND THAT IS MY REASON FOR NOT GIVING THE STUFF TO MR. ROBBINS.

I DON'T HAVE ANY HEARTBURN ABOUT HIM READING IT. HE IS ENTITLED TO READ IT. I HAVE NO OBJECTION TO THAT.

THE COURT: VERY WELL.

MR. ROBBINS MADE REFERENCE TO A PROBLEM WITH WITNESSES AT THE LINE-UP.

CAN YOU ELUCIDATE A LITTLE BIT ON THAT?

MR. SEIFER: I WILL, YOUR HONOR, IF I DON'T -- IF THIS DOESN'T GET INTO SOMETHING BETWEEN BY CLIENT AND MYSELF.

THE COURT: STOP SHORT OF THE PRIVILEGE.

MR. SEIFER: I WILL TRY TO DO THAT, YOUR HONOR.

THERE WAS A WITNESS OR COUPLE OF WITNESSES WHO SAW A MAN ON THE CORNER OF THE STREET OF WITNESSES WHO SAW A MAN ON THE CORNER OF THE STREET WHERE



THE HOUSE WAS WHERE THE VICTIM DIED ON NEW YEAR'S EVE OF -- ON DECEMBER 31ST, 1938. THOSE PEOPLE SPOKE TO A MAN ON THAT CORNER SOMETIME AROUND 6:00 OR 6:15 OR 6:30 THAT EVENING.

THEY SUBSEQUENTLY TOLD THE SHERIFF THAT THEY COULD NOT IDENTIFY HIM, BUT THERE WAS -- THEY GAVE THE SHERIFF WHAT THE BASIS WAS OF THE CONVERSATION.

I BELIEVE THERE WAS AN INTERVIEW WITH MR. ROBBINS BEFORE HE BECAME A CLIENT OF THE PUBLIC DEFENDER IN WHICH INTERVIEW HE TOLD THE SHERIFF THAT HE HAD STOPPED HIS I BELIEVE IT WAS A PICKUP TRUCK ON THAT CORNER AT ABOUT THAT TIME TO LET HIS LITTLE DOG OUT TO URINATE.

AND THE DOG HAD BEEN FRIGHTENED BY SOME NOISES, WHICH WERE APPARENTLY

FIRECRACKERS OR SOUNDED LIKE FIRECRACKERS.

THE PEOPLE AT THE HOUSE ON THE CORNER CAME OUT, SAW THE MAN ON THEIR LAWN, AND ASKED HIM WHAT HE WAS DOING. AND I THINK HE SAID HE WAS TRYING TO LOCATE HIS DOG.

THE WIFE OF THE COUPLE WHO LIVE AT THAT ADDRESS TESTIFIED FOR THE PROSECUTION AT THE PRELIM ABOUT THE CONVERSATION AND THE FACT THAT SHE SPOKE TO A MAN. SHE COULD NOT IDENTIFY THAT MAN AS LEE ROBBINS, DIDN'T REMEMBER PRECISELY WHAT HE LOOKED LIKE. SHE TESTIFIED AT THE PRELIM BASICALLY AS SHE TOLD TH INVESTIGATING OFFICERS AT THE TIME.

MR. ROBBINS FEELS THAT THERE SHOULD BE A LINE-UP AND I GUESS THE

PURPOSE OF THE LINE-UP WOULD BE TO CONFIRM THAT SHE COULDN'T IDENTIFY HIM. SHE HAS ALREADY TESTIFIED TO THAT FACT AT THE PRELIM. I AM NOT QUITE SURE WHO ELSE MR. ROBBINS FEELS SHOULD COME TO A LINE-UP AND FOR WHAT PURPOSE.

I AM UNCLEAR AS TO -- WE HAVE DISCUSSED THIS IN THE PAST. SHE DIDN'T IDENTIFY HIM THEN, SHE DIDN'T IDENTIFY HIM AT THE PRELIM. I DON'T SEE ANY REASON WHY I NEED A LINE-UP.

THE COURT: EVIDENTIARYWISE, NOTHING WOULD APPEAR TO BE GAINED BY HAVING HER PRESENT AT A LINE-UP. PRESUMABLY HER INABILITY TO IDENTIFY WOULD BE THE SAME. THE ONLY THING SHE COULD DO WOULD BE TO CHANGE HER TESTIMONY TO THE DETRIMENT OF THE DEFENDANT.

MR. SEIFER: WELL, IF THAT IS THE WITNESS THAT MR. ROBBINS WANTS BROUGHT TO A LINE-UP, YOUR HONOR, I AM NOT REALLY SURE WHAT HE IS ASKING FOR IN THAT REGARD. MAYBE HE COULD -- IF I AM NOT ADDRESSING HIS SPECIFIC COMPLAINT PRECISELY, MAYBE HE COULD TELL ME.

THE COURT: ALL RIGHT.

I WILL GET BACK TO MR. ROBBINS IN A MINUTE.

FINALLY I HAVE A NOTE HERE ABOUT A POINT THAT MR. ROBBINS MADE CONCERNING A CONFLICT OF INTEREST BETWEEN THE PUBLIC DEFENDER'S OFFICE, THE SHERIFF, I GUESS ANYONE IN LAW ENFORCEMENT OR FUNCTIONING IN THE CAPACITY AS THE PUBLIC DEFENDER BECAUSE THE VICTIM'S SISTER WORKS FOR ONE OF THE SHERIFF DEPARTMENTS.

DO YOU SEE ANY PROBLEM THERE?

MR. SEIFER: YOUR HONOR, I DON'T KNOW WHO THE VICTIM'S SISTER IS BY NAME. IT MAY BE IN MY FILE, BUT I HAVE HAD NO CONTACT WITH HER. I HAVE REGULAR CONTACT WITH THE SHERIFF ON THIS CASE AND OTHER CASES.

MR. ROBBINS ALSO GAVE ME THE NAME OF A -- I THINK A FORMER BROTHER-IN-LAW OF HIS WHO IS AN OFFICER OF THE COMPTON POLICE DEPARTMENT. I CALLED THAT GENTLEMAN. I HAVE SPOKEN WITH HIM.

I DON'T THINK THAT REPRESENTS ANY MORE OR LESS OF A CONFLICT THAN THE VICTIM'S SISTER BEING ON THE SHERIFF'S DEPARTMENT. IF IT REPRESENTS A CONFLICT, I DON'T REALLY SEE IT.

THE COURT: DO YOU HAVE ANYTHING ELSE, MR. ROBBINS?

THE DEFENDANT: NO, SIR. EXCEPT THAT IF THE COURT IS UNABLE TO APPOINT ANOTHER ATTORNEY FOR ME, YOUR HONOR, I WOULD LIKE TO REQUEST TO REPRESENT MYSELF IN THE MATTER RATHER THAN GO TO TRIAL WITH MR. SEIFER.

THE COURT: WELL, ALL RIGHT.

YOU CERTAINLY HAVE A RIGHT TO DO THAT.

LET ME -- I DON'T THINK THERE IS ANYTHING HERE THAT THE DISTRICT ATTORNEY CAN SHED ANY LIGHT ON. I THINK WE CAN RESOLVE THE MATTER HERE AMONG THE THREE OF US.

HOW MANY TIME HAVE YOU BEEN OUT TO VISIT MR. ROBBINS, MR. SEIFER?

MR. SEIFER: YOUR HONOR, I HAVE A -- I KEEP A DAILY JOURNAL, A DAYTIME WHERE I AM SURE THE COURT IS FAMILIAR WITH THAT.



I HAVE -- MY DAYTIME IS IN THE OFFICE SINCE I WAS ASSIGNED TO THIS CASE. I WOULD HAVE TO GO BACK AND LOOK TO TELL YOU PRECISELY. BUT I --

THE COURT: TO THE BEST OF YOUR RECOLLECTION.

MR. SEIFER: THERE WAS ONE VISIT AT THE COUNTY JAIL WHEN MR. ROBBINS FIRST -- WHEN I FIRST PICKED UP MR. ROBBINS AS A CLIENT.

THERE WAS I BELIEVE TWO VISITS, MAYBE MR. ROBBINS CAN CORRECT ME IF I AM WRONG, TWO VISITS AT WAYSIDE. AND THERE WAS A VISIT WHEN I ASKED THE SHERIFF TO DELIVER MR. ROBBINS TO BELLFLOWER WHERE I SAT DOWN WITH MR. ROBBINS AND REED WEBB OF OUR OFFICE AND WE BOTH SPOKE TO HIM AT SOME LENGTH.

I WOULD SUGGEST THERE HAVE BEEN AT LEAST FOUR DISCUSSIONS AT SOME LENGTH AND I WOULD ESTIMATE THAT EACH ONE OF THOSE WAS PROBABLY AN HOUR OR BETTER ON EACH OCCASION. AND THERE MAY HAVE BEEN OTHERS THAT I CAN'T SPECIFICALLY RECALL, YOUR HONOR.

THE COURT: MR. ROBBINS, DO YOU FIND MR. SEIFER DIFFICULT TO TALK TO?

THE DEFENDANT: WE DON'T AGREE ON THE CASE. WE HAVEN'T AGREED ON THE CASE SINCE I FIRST PICKED MR. SEIFER UP.

THE COURT: BUT IS HE A MAN THAT YOU CAN TALK TO, YOU CAN CONVERSE WITH, YOU CAN EXPRESS YOURSELF TO HIM, AND HE CAN EXPRESS HIMSELF TO YOU AND, IN OTHER WORDS, ARE THE TWO OF YOU COMMUNICATING OPENLY?

THE DEFENDANT: I DON'T THINK WE ARE COMMUNICATING, SIR. I THINK THERE IS A DEFINITE LACK OF UNDERSTANDING INVOLVED. I DON'T KNOW IF IT IS PERSONALITY DIFFERENCES OR THE FACT THAT HE SEES THE CASE IN ONE LIGHT AND I SEE IT IN ANOTHER.

THE COURT: YOU ARE TALKING TO EACH OTHER, BUT YOU ARE NOT SURE YOU ARE GETTING EACH OTHER'S MEANING; IS THAT WHAT YOU ARE SAYING?

THE DEFENDANT: YES, SIR. AND DUE TO THE NATURE OF THE CASE, I FEEL I SHOULD HAVE ANOTHER ATTORNEY. I DON'T HAVE ANYTHING PERSONAL AGAINST MR. SEIFER, BUT I DON'T FEEL WE ARE DOING WHAT I THINK AS A CLIENT AND AN ATTORNEY.

THE COURT: WELL, LET ME JUST BRIEFLY STATE FOR YOU WHAT THE RULES ARE THAT GOVERN MY DECISION HERE.

THE DEFENDANT: YES, SIR.

THE COURT: I HAVE A TWO-PRONG APPROACH TO THE ANALYSIS OF THIS KIND OF A PROBLEM.

THE FIRST PRONG IS TO DETERMINE WHETHER ON THE BASIS OF THE THINGS THAT YOU HAVE SAID TO ME AND ON THE BASIS OF MR. SEIFER'S REPLIES, EXPLANATIONS, COMMENTS, THAT I CONCLUDE THAT MR. SEIFER CAN PROVIDE YOU WITH CONSTITUTIONALLY ADEQUATE REPRESENTATION OR THAT HE CANNOT PROVIDE YOU WITH CONSTITUTIONALLY ADEQUATE OR COMPETENT REPRESENTATION.

IN OTHER WORDS, DOES MR. SEIFER UNDERSTAND THE NATURE OF THE CASE, IS HE

A PRACTICED, KNOWLEDGEABLE ATTORNEY, IS HE COMPETENT TO REPRESENT YOU IN ALL OF THE WAYS THAT THE CONSTITUTION REQUIRES THAT YOU BE REPRESENTED IN COURT -- CONFRONTING AND CROSS-EXAMINING WITNESSES, TESTIFYING OR NOT TESTIFYING GOING IN ACCORDANCE WITH YOUR RIGHT TO REMAIN SILENT, PRESENTING WITNESSES ON YOUR BEHALF IF YOU DECIDE TO DO THAT -- ALL OF THE THINGS THAT A PRACTICED, COMPETENT ATTORNEY CAN DO FOR YOU AT TRIAL.

THE OTHER PRONG OF THE ANALYSIS IS THE COMMUNICATION BETWEEN THE TWO OF YOU. IF THE COMMUNICATION BETWEEN THE TWO OF YOU WAS AT SUCH A STAGE THAT YOU SIMPLY WEREN'T TALKING AT ALL SO THAT MR. SEIFER COULDN'T PROVIDE YOU WITH CONSTITUTIONALLY COMPETENT

REPRESENTATION SIMPLY BECAUSE THE TWO OF YOU WEREN'T COMMUNICATING, JUST WEREN'T EVEN TALKING, THEN WE MIGHT HAVE A PROBLEM.

BUT THE CASES THAT ADDRESS THIS KIND OF A PROBLEM TELL ME THAT THE RESPONSIBILITY FOR COMMUNICATING IS A TWO-WAY STREET. THE ATTORNEY MUST TRY TO COMMUNICATE WITH THE CLIENT, THE CLIENT MUST TRY TO COMMUNICATE WITH THE ATTORNEY. BOTH PARTIES MUST MAKE AN EFFORT TO TRY TO COMMUNICATE IN A MEANINGFUL WAY WITH EACH OTHER.

AND WHILE YOU MAY NOT BELIEVE THAT MR. SEIFER AGREES WITH YOUR THEORY OF THE CASE, WHILE YOU MAY BELIEVE THAT MR. SEIFER TACTICALLY WANTS TO DO THINGS OR NOT TO DO, DOESN'T MEAN THAT THE TWO OF YOU AT LEAST AREN'T TALKING, THAT YOU



ARE ABLE TO SIT DOWN AND DISCUSS THE THING EVEN THOUGH YOU ARE NOT COMING TO AN AGREEMENT.

I DON'T FIND ANY BASIS FOR GRANTING YOUR MARSDEN MOTION, MR. ROBBINS. MR. SEIFER IS A KNOWLEDGEABLE, PRACTICED, EXPERIENCED, SKILLED CRIMINAL DEFENSE LAWYER.

HE IS NOT ASSIGNED TO MY COURT, BUT I KNOW THAT HE HAS BEEN IN MY COURT ON OCCASION IN DEFENSE OF DEFENDANTS. I KNOW HIM FROM OBSERVATION, I KNOW HIM BY REPUTATION AS A THOROUGHLY KNOWLEDGEABLE AND COMPETENT CRIMINAL DEFENSE ATTORNEY.

I CANNOT FIND THAT THE TWO OF YOU HAVE REACHED THAT POINT IN THE BREAKDOWN OF YOUR COMMUNICATION SO THAT YOUR CONSTITUTIONAL RIGHTS FOR

COMPETENT REPRESENTATION HAVE BEEN PREJUDICED. I AM THEREFORE COMPELLED ON WHAT YOU'VE PRESENTED AND THE COMMENTS AND RESPONSES THAT I HAVE FROM MR. SEIFER TO DENY YOUR MOTION AND I DO SO HEREWITH.

NOW, YOU ARE SAYING TO ME NOW YOU WANT TO REPRESENT YOURSELF?

THE DEFENDANT: YES, SIR. I AM LEFT WITH NO CHOICE IN THE MATTER.

THE COURT: WELL, HAVE YOU RECEIVED A COPY OF OUR FARETTA QUESTIONNAIRE?

THE DEFENDANT: NO, SIR, I HAVEN'T.

THE COURT: ALL RIGHT.

WHEN IS YOUR TRIAL DATE?

MR. SEIFER: YOUR HONOR, THE CALENDAR RIGHT NOW IS 4-20-90. THAT WOULD BE THE 50TH DAY.

THE COURT: 4-20 IS 50 OF 60?

MR. SEIFER: YES, YOUR HONOR.

THE COURT: WHERE ARE YOU HOUSED,  
MR. ROBBINS?

THE DEFENDANT: AT THE L.A. COUNTY  
RIGHT NOW.

THE COURT: CENTRAL?

THE DEFENDANT: YES, SIR.

THE COURT: ALL RIGHT.

WELL, WHAT I WANT TO DO IS GIVE  
YOU A COPY OF A QUESTIONNAIRE THAT I  
WOULD LIKE FOR YOU TO READ AND TO THINK  
ABOUT BECAUSE IT IS GOING TO GIVE YOU  
SOME IDEA OF THE KIND OF QUESTIONS THAT  
I WANT TO ASK YOU WHEN YOU AND I TALK  
ABOUT WHETHER YOU SHOULD REPRESENT  
YOURSELF OR NOT.

THE FIRST THING I AM GOING TO DO IS  
TO TRY TO TALK YOU OUT OF IT FOR MANY

REASONS THAT YOU WILL SEE IN THE FORM OF  
THE QUESTIONS --

THE DEFENDANT: YES, SIR, I UNDERSTAND  
THAT.

THE COURT: -- THAT APPEAR ON THE  
QUESTIONNAIRE.

YOU DON'T HAVE TO FILL IT OUT. I  
JUST WANT YOU TO SEE IT AND CONSIDER IT,  
AND THEN I WOULD LIKE TO GET BACK WITH  
YOU IN A WEEK, AND WE WILL TALK ABOUT IT.

IS THAT AGREEABLE?

THE DEFENDANT: YES, SIR, IT IS.

THE COURT: YES, MR. SEIFER.

MR. SEIFER: YOUR HONOR, BECAUSE OF  
THE CALENDAR, REGARDLESS OF WHO ENDS UP  
REPRESENTING MR. ROBBINS, WHETHER IT IS  
MYSELF OR MR. ROBBINS IN PRO PER OR  
PERHAPS SOMEBODY THAT HE RETAINS  
ULTIMATELY, I WOULD ASK THE COURT TO SET

THIS MATTER SOONER THAN A WEEK FOR A HEARING BECAUSE THE CLOCK IS RUNNING.

I HAVE GOT AN INVESTIGATOR GOING ON THIS CASE AND I HAVE GOT WORK THAT I AM DOING. MR. ROBBINS, IF HE REPRESENTS HIMSELF, WILL HAVE ADDITIONAL WORK AND I HAVE SPOKEN TO MR. ROBBINS.

AS THE COURT NOTES, HE AND I HAVE SOME SUBSTANTIAL DISAGREEMENTS ON A NUMBER OF POINTS, BUT I THINK MR. ROBBINS CAN LOOK AT THE FARETTA QUESTIONNAIRE AND COMPREHEND THE SCOPE OF THE COURT'S INQUIRY. AND I WOULD SUGGEST, SIR, WITH ALL RESPECT, THAT HE ISN'T GOING TO NEED A WEEK TO DO THAT.

THE COURT: ALL RIGHT.

I AM PERFECTLY WILLING TO GET BACK TO IT EARLIER. AND I THINK AS YOU POINT

OUT, IN FAIRNESS TO HIM HE SHOULD HAVE AS MUCH TIME.

ONE THING YOU HAVE GOT TO CONSIDER, MR. ROBBINS, IS YOU GET NO HELP FROM THE PUBLIC DEFENDER'S OFFICE. THERE ISN'T GOING TO BE ANYBODY HELP YOU GET YOUR WITNESSES PULLED TOGETHER, THERE ISN'T GOING TO BE ANYBODY TO PREPARE SUBPOENAS FOR YOU. THERE ISN'T GOING TO BE ANYBODY TO HELP YOU ARRANGE FOR INTERVIEWS.

YOU HAVE GOT ALL THAT TO DO FOR YOURSELF.

THE DEFENDANT: YES, SIR.

THE COURT: AND YOU GET NO HELP FROM ME AND YOU WILL BE UP AGAINST A PRACTICED, EXPERIENCED TRIAL LAWYER AND YOU ARE GOING TO MAKE MISTAKES AND YOU ARE GOING TO LEAVE THINGS OUT AND YOU



ARE GOING TO PREJUDICE THE RECORD AND I AM NOT BEING CRITICAL OF YOU.

THE DEFENDANT: YES, SIR.

THE COURT: BUT THIS IS A PROFESSION.

THE DEFENDANT: YES, SIR.

THE COURT: THAT PEOPLE STUDY YEARS TO BECOME COMPETENT IN.

THE DEFENDANT: YES, SIR. THAT IS WHY I REQUESTED ANOTHER ATTORNEY.

THE COURT: OKAY.

THIS IS WEDNESDAY. LET'S GET BACK TOGETHER NEXT MONDAY. THE REST OF THE WEEK IS PRETTY JAMMED UP FOR ME.

THE DEFENDANT: NEXT MONDAY, SIR.

THE COURT: LET'S GET BACK ON MONDAY THE 12TH.

MR. SEIFER: YOUR HONOR, I HAVE GOT A MURDER PRELIM OR MANSLAUGHTER PRELIM THAT HAS BEEN ASSIGNED TO ME DOWNTOWN

ON THE 12TH. AND IF I KNOW HOW THINGS GO DOWN THERE, IT IS GOING TO RUN ALL DAY BEFORE THEY GET ANYTHING GOING.

THE COURT: WE CAN GET BACK TOGETHER HERE ON FRIDAY AFTERNOON.

MR. SEIFER: THAT WOULD BE FINE WITH ME, YOUR HONOR.

THE COURT: IS THAT AGREEABLE, MR. ROBBINS?

THE DEFENDANT: YES, SIR.

THE COURT: LET'S CALENDAR THIS FOR FRIDAY AT 1:30.

MR. SEIFER: THANK YOU, YOUR HONOR.

THE COURT: THAT WILL BE THE ORDER. WE WILL CONTINUE THE MATTER FOR FARETTA HEARING TO 1:30 ON FRIDAY.

THE DEFENDANT: THANK YOU, YOUR HONOR.

(AT 2:25 PM., THE PROCEEDINGS WERE  
CONTINUED TO FRIDAY, MAY 9, 1990, AT  
1:30 P.M.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT SE J      Hon. C. ROBERT SIMPSON, JR.,  
JUDGE

THE PEOPLE OF THE STATE	)	
OF CALIFORNIA,	)	NO. A 481636
	)	
PLAINTIFF,	)	
	)	
v.	)	
	)	
LEE ROBBINS,	)	
	)	
DEFENDANT.	)	
<hr/>		

REPORTER'S CERTIFICATE

STATE OF CALIFORNIA	)	
	)	SS
COUNTY OF LOS ANGELES	)	

I, KATHLEEN H. ADAMS, OFFICIAL  
REPORTER OF THE SUPERIOR COURT OF THE  
STATE OF CALIFORNIA, FOR THE COUNTY OF  
LOS ANGELES, DO HEREBY CERTIFY THAT THE  
FOREGOING PAGES, 12 THROUGH 30, INCLUSIVE,  
COMPRISE A FULL, TRUE AND CORRECT  
TRANSCRIPT OF THE MARSDEN PROCEEDINGS

HELD IN DEPARTMENT SOUTHEAST J ON  
WEDNESDAY, MARCH 7, 1990.

DATED THIS 14TH DAY OF NOVEMBER,  
1990.

KATHLEEN H. ADAMS, CSR #2853  
OFFICIAL REPORTER

NORWALK, CALIFORNIA;

FRIDAY, MARCH 9, 1990\*

1:38 P.M.

DEPARTMENT SE J      HON. C. ROBERT  
                                 SIMPSON, JR., JUDGE

APPEARANCES:

THE DEFENDANT WITH HIS COUNSEL,  
RALPH SEIFER, DEPUTY PUBLIC DEFENDER  
OF LOS ANGELES COUNTY, TIA B. GRAVES,  
DEPUTY DISTRICT ATTORNEY OF LOS  
ANGELES COUNTY, REPRESENTING THE  
PEOPLE OF THE STATE OF CALIFORNIA.

(KATHLEEN H. ADAMS, OFFICIAL  
REPORTER.)

(THE MARSDEN PROCEEDINGS, PAGES 1  
THROUGH 30, WERE PREPARED UNDER  
SEPARATE COVER FOR APPELLATE  
PURPOSES, SEALED IN AN ENVELOPE,  
AND FILED ALONG WITH THE APPEAL



TRANSCRIPT, PURSUANT TO RULE 1,  
LOCAL RULES OF THE COURTS OF  
APPEAL.)

THE COURT: GOOD AFTERNOON, MR.  
ROBBINS.

THE DEFENDANT: GOOD AFTERNOON, SIR.

THE COURT: LET THE RECORD SHOW THAT  
LEE ROBBINS IS IN COURT REPRESENTED BY  
HIS ATTORNEY, PUBLIC DEFENDER RALPH  
SEIFER. THE PEOPLE ARE REPRESENTED HERE  
BY DEPUTY DISTRICT ATTORNEY TIA GRAVES.

MR. ROBBINS, THE MATTER IS BEFORE  
THE COURT THIS AFTERNOON IN REGARD TO  
YOUR MOTION TO PROCEED PRO PER.

DO YOU STILL WISH TO DO THAT?

THE DEFENDANT: YES, SIR, I DO. I HAVE  
NO OTHER CHOICE UNLESS THE COURT IS

GOING TO APPOINT THE ATTORNEY I HAVE  
REQUESTED.

THE COURT: WELL, IF I APPOINT AN  
ATTORNEY, IT WILL BE THE PUBLIC  
DEFENDER'S OFFICE. THAT IS THE ONLY  
ALTERNATIVE I HAVE.

THE DEFENDANT: EVEN THOUGH I HAVE  
INDICATED THERE ARE CONFLICTS INVOLVED,  
SIR?

THE COURT: WELL, THE PUBLIC  
DEFENDER'S OFFICE DOESN'T REGARD  
ANYTHING IN THEIR RELATIONSHIP WITH YOU  
AS BEING IN CONFLICT WITH YOUR BEST  
INTERESTS. THE PUBLIC DEFENDER'S OFFICE  
REPRESENTS TO ME THAT THEY HAVE YOUR  
BEST INTERESTS AT HEART AND THAT THEY  
WILL DO EVERYTHING WITHIN THEIR POWER  
AND RESOURCE TO REPRESENT YOU  
COMPETENTLY HERE.

I KNOW WHAT YOU HAVE TOLD ME ABOUT YOUR FEELINGS TOWARD MR. SEIFER. BUT YOU MAY NOT THINK MR. SEIFER IS THE GREATEST FELLOW YOU EVER MET, YOU MAY NOT EVEN LIKE HIM, BUT THAT IS NOT CONTROLLING HERE.

THE DEFENDANT: YES, SIR.

THE COURT: YOU'RE IN CONTROL OF YOUR DEFENSE. AND IF YOU AGREE WITH SOMETHING MR. SEIFER BRINGS TO YOU, YOU SAY SO. IF YOU DISAGREE WITH SOMETHING HE BRINGS TO YOU, YOU TELL HIM NO.

THE DEFENDANT: YES, SIR.

THE COURT: DO IT THIS WAY OR THAT WAY. OR IF HE DOESN'T DO IT THE WAY YOU HAVE ASKED HIM TO DO IT, SAY NO AND REQUIRE HIM TO GO BACK.

THE DEFENDANT: WE HAVE BEEN HAVING THAT PROBLEM, DISCUSSIONS PERTAINING TO

THE CASE, YOUR HONOR. AND WHATEVER I SAY I WANT SOMETHING DONE OR NOT DONE, IT IS IMMATERIAL. MR. SEIFER PROCEEDS ON HIS OWN.

HE IS SUPPOSED TO BE WORKING IN MY BEST INTERESTS. I DON'T FEEL THAT THAT IS BEING DONE.

THE COURT: ON THE BASIS OF THE DISCUSSION WE HAD THE OTHER DAY, MR. ROBBINS, WHEN YOU EXPRESSED YOUR SPECIFIC CONCERNS AND I ASKED MR. SEIFER TO RESPOND AND HE DID, I CAN COME TO NO OTHER CONCLUSION BUT THAT WHAT MR. SEIFER IS DOING IS IN YOUR BEST INTERESTS AND --

MR. SEIFER.

MR. SEIFER: YOUR HONOR, EXCUSE ME. I APOLOGIZE FOR INTERRUPTING THE COURT.

IF WE ARE GOING TO DISCUSS THIS CASE IN ANY DETAIL, I WOULD BE ASKING IF THE PEOPLE WOULD BE EXCUSED FROM THE COURTROOM.

THE COURT: I THINK WE WILL NOT BE DISCUSSING THE CASE IN DETAIL.

LET ME SUMMARIZE AND GIVE YOU MY BOTTOM LINE. MR. SEIFER IS A COMPETENT, KNOWLEDGEABLE, HARDWORKING, EFFECTIVE PUBLIC DEFENDER. I AM CONVINCED THAT HE HAS YOUR BEST INTERESTS AT HEART. I AM CONVINCED HE CAN GIVE YOU A CONSTITUTIONALLY COMPETENT DEFENSE.

YOU HAVE A RIGHT TO REPRESENT YOURSELF. AND AS I MENTIONED TO YOU THE OTHER DAY, THE ONLY THING I CAN DO IS TO TRY TO TALK YOU OUT OF IT. IF YOU NEEDED SURGERY ON YOUR BRAIN, YOU WOULDN'T TRY TO DO IT YOURSELF.

THE DEFENDANT: I UNDERSTAND THAT, SIR. THAT'S WHY I DON'T WANT TO REPRESENT MYSELF. I AM ASKING THE COURT TO PLEASE APPOINT ANOTHER ATTORNEY AND HELP ME.

THE COURT: WELL, THE ATTORNEY THAT I MUST APPOINT FOR YOU --

THE DEFENDANT: YES, SIR.

THE COURT: -- IS THE OFFICE OF THE PUBLIC DEFENDER.

IF YOU CAN AFFORD TO HIRE YOUR OWN ATTORNEY --

THE DEFENDANT; I WOULD HAVE DONE SO BY NOW, YOUR HONOR.

THE COURT: -- AND PAY FOR HIM, THEN OF COURSE THAT IS YOUR PREROGATIVE.

THE DEFENDANT: YES, SIR.

THE COURT: YOU ARE AT COMPLETE LIBERTY TO DO THAT. BUT THE ONLY AUTHORITY I HAVE UNDER ALL THE FACTS



AND CIRCUMSTANCES BEFORE ME IS TO APPOINT OR REAPPOINT THE OFFICE OF THE PUBLIC DEFENDER.

THE DEFENDANT: EVEN THOUGH I HAVE STATED THE CONFLICTS INVOLVED DUE TO THE FACT THE EX-MAYOR OF CITY OF CERRITOS --

THE COURT: DON'T GET INTO THE FACTS OF THE CASE.

YES, EVEN THOUGH YOU HAVE DESCRIBED FOR ME WHAT YOU CONSIDER TO BE THE PROBLEMS THAT YOU ARE HAVING, THE CONCLUSIONS THAT I HAVE COME TO IS THAT THE ANSWERS THAT MR. SEIFER HAS GIVEN ME INDICATE TO ME THAT WHAT HE IS DOING IS IN YOUR BEST INTERESTS.

AS I SAY, YOU MAY NOT COUNT MR. SEIFER AMONG YOUR FAVORITE PEOPLE YOU HAVE EVER KNOWN IN THE WORLD, BUT I AM

PERSUADED THAT FOR YOUR PURPOSES AS A DEFENSE LAWYER, HE'S PERFECTLY AND TOTALLY COMPETENT IN PROVIDING YOU WITH THE BEST DEFENSE I KNOW.

THE DEFENDANT: YOUR HONOR, WOULD IT BE POSSIBLE FOR ME TO TALK TO MR. SEIFER ALONE FOR A FEW MINUTES?

THE COURT: CERTAINLY WOULD BE. I INVITE YOU TO DO THAT. IN FACT I WILL EXCUSE MYSELF AND THE DISTRICT ATTORNEY AND WE WILL DO THE SAME --

MR. SEIFER: MAYBE WE MIGHT --

THE COURT: YOU CAN USE THESE COURTROOM FACILITIES RIGHT HERE IF YOU WISH BECAUSE I HAVE OTHER WORK TO DO.

MR. SEIFER: IS THE TANK OPEN? ARE THERE OTHER PEOPLE IN THE TANK?

THE BAILIFF: THERE ARE PEOPLE IN THE TANK.

MR. SEIFER: CAN WE GO IN THE SIDE POCKET?

THE BAILIFF: YES.

THE COURT: ALL RIGHT.

(RECESS.)

THE COURT: BACK ON THE RECORD IN THE MATTER OF LEE ROBBINS.

MR. ROBBINS, HAVE YOU TALKED TO MR. SEIFER?

THE DEFENDANT: YES, SIR, I HAVE.

THE COURT: WHAT WAS THE OUTCOME OF THAT CONVERSATION?

THE DEFENDANT: I AM TO REPRESENT MYSELF, SIR.

THE COURT: YOU ARE GOING TO REPRESENT YOURSELF?

THE DEFENDANT: YES, SIR.

THE COURT: ALL RIGHT.

I WOULD REPEAT ONLY BY WAY OF EMPHASIS THAT I THINK YOU ARE MAKING A MISTAKE.

THE DEFENDANT: YFS, SIR.

THE COURT: OKAY.

YOU'RE AWARE, ARE YOU NOT, OF THE PENALTIES INVOLVED HERE IF YOU ARE FOUND GUILTY?

THE DEFENDANT: YES, SIR. I COMPLETED THAT FORM.

THE COURT: YOU DON'T HAVE TO TURN IT IN. I JUST WANTED YOU TO LOOK AT IT.

YOU UNDERSTAND THAT THE COURT CAN'T HELP YOU --

THE DEFENDANT: YES, SIR.

THE COURT: -- WITH ANYTHING YOU DO.

THE DEFENDANT: YES, SIR.

THE COURT; I CAN'T GIVE YOU ANY ADVICE, I CAN'T GIVE YOU ANY COACHING, I CAN'T RAISE ANY FLAGS FOR YOU.

THE DEFENDANT: YES, SIR.

THE COURT: I HAVE TO TREAT YOU JUST THE WAY I DO THE DISTRICT ATTORNEY WHO IS GOING TO BE HERE WHO IS A PRACTICED, SKILLED, KNOWLEDGEABLE PROSECUTING ATTORNEY.

YOU UNDERSTAND THAT?

THE DEFENDANT: YES, SIR.

THE COURT: YOU UNDERSTAND THAT YOU ARE PROBABLY GOING TO MAKE MISTAKES THAT MIGHT PREJUDICE YOU, YOU ARE GOING TO LEAVE THINGS OUT OF THE RECORD THAT SHOULD BE THERE, ON APPEAL YOU ARE GOING TO FIND DEFICIENCIES IN THE RECORD THAT WOULDN'T BE THERE IF YOU WERE BEING REPRESENTED.

YOU UNDERSTAND ALL THAT?

THE DEFENDANT: YES, SIR. I AM HOPING TO DO IT RIGHT THE FIRST TIME.

THE COURT: YOU ARE ALSO AWARE THAT ON APPEAL YOU CANNOT -- YOU ARE ENTITLED TO AN ATTORNEY ON APPEAL IF YOU WANT ONE, BUT ON APPEAL YOU CANNOT RAISE THE POINT THAT, IF YOU REPRESENT YOURSELF, YOU WERE NOT COMPETENTLY REPRESENTED.

THE DEFENDANT: YES, SIR, I UNDERSTAND THAT.

THE COURT: YOU UNDERSTAND THAT ALSO?

THE DEFENDANT: YES, SIR.

THE COURT: ALL RIGHT.

IF YOU DECIDE LATER ON THAT YOU WANT ME TO APPOINT AN ATTORNEY, YOU UNDERSTAND IT WILL BE THE PUBLIC DEFENDER'S OFFICE.



THE DEFENDANT: YES, SIR. MR. SEIFER INFORMED ME OF THAT.

THE COURT: IF YOU DECIDE LATER ON YOU WANT TO BRING YOU OWN ATTORNEY IN, I WILL ACCOMMODATE YOU WITH ONE, POSSIBLY TWO CONTINUANCES, BUT NO MORE. YOU ARE GOING TO HAVE TO BE READY TO GO TO TRIAL.

THE DEFENDANT: YES, SIR.

THE COURT: YOU WON'T HAVE ANYBODY ASSISTING YOU WITH SUBPOENAS, BRINGING WITNESSES IN FOR INTERVIEW, YOU WON'T HAVE ANY ASSISTANCE OF ANY KIND FROM THE PUBLIC DEFENDER'S OFFICE OR ANYBODY ELSE.

YOU ALSO UNDERSTAND THAT?

THE DEFENDANT: YES, SIR.

THE COURT: ALL RIGHT.

THE PENALTY I GUESS IN THIS MATTER, MR. SEIFER, IS 25 YEARS TO LIFE?

THE DEFENDANT: TWENTY-SEVEN I BELIEVE, YOUR HONOR.

MR. SEIFER: TWENTY-FIVE TO LIFE ON THE MURDER COUNT, YOUR HONOR, AND TWO YEARS IF IT IS SHOWN THAT -- TWO YEARS ADDITIONAL IF IT IS SHOWN THAT THE DEFENDANT HAD A GUN. SO IT COULD BE 27 TO LIFE.

THE COURT: ALL RIGHT.

TWENTY-SEVEN TO LIFE.

MR. SEIFER: THERE IS ALSO A RELATIVELY MINOR ASPECT OF THE CASE, YOUR HONOR, IN THAT THERE IS A 487 COUNT.

THE COURT: A WHAT, I AM SORRY?

MR. SEIFER: THERE IS A 487 COUNT, A THEFT COUNT INVOLVING A TRUCK, YOUR

HONOR, BUT THAT IS RELATIVELY A MINOR  
THEME IN ALL OF THIS.

THE COURT; ALL RIGHT.

HOW FAR ALONG DID YOU GET IN  
SCHOOL, MR. ROBBINS?

THE DEFENDANT: COUPLE OF YEARS OF  
COLLEGE, YOUR HONOR.

THE COURT: JUNIOR COLLEGE?

THE DEFENDANT: I WENT TO JUNIOR  
COLLEGE, CERRITOS COLLEGE, AND KANSAS  
STATE UNIVERSITY IN KANSAS.

THE COURT: WHAT WAS YOUR FIELD OF  
STUDY THERE?

THE DEFENDANT: I WENT THROUGH THE  
SHERIFF'S ACADEMY IN KANSAS AND I WAS  
THIRD HIGHEST IN MY CLASS AND I STUDIED  
ADMINISTRATION OF JUSTICE HERE AT  
CERRITOS COLLEGE.

THE COURT: SO YOU HAVE HAD SOME  
ACADEMIC BACKGROUND IN LAW  
ENFORCEMENT?

THE DEFENDANT: YES, SIR.

THE COURT: ENOUGH TO MAKE YOU  
REALIZE THE IMPORTANCE OF HAVING AN  
ATTORNEY.

THE DEFENDANT: DEFINITELY, YOUR  
HONOR.

THE COURT: WELL, YOU HAVE THE RIGHT  
TO REPRESENT YOURSELF.

THE DEFENDANT: YOUR HONOR, WOULD IT  
BE POSSIBLE TO SET THE PRETRIAL  
APPROXIMATELY 60 DAYS FROM NOW?

THE COURT: THERE IS A LITTLE RECORD  
OF WHAT WE HAVE BEEN TALKING ABOUT  
HERE THAT I WOULD LIKE FOR YOU TO LOOK  
OVER AND SIGN IF IT FAIRLY REFLECTS WHAT  
WE'VE TALKED ABOUT HERE.

THE DEFENDANT: YES, SIR.

THE COURT: AND IT IS ONLY A PAGE. IF YOU ARE WILLING TO SIGN THIS, I AM GOING TO FIND THAT YOU HAVE PROPERLY WAIVED YOUR RIGHT TO BE REPRESENTED.

WOULD YOU HAND THIS TO MR. ROBBINS, PLEASE.

MS. GRAVES: YOUR HONOR, WITH THE COURT'S PERMISSION, SINCE MR. ROBBINS, IF HE -- HE WILL BE ALLOWED TO GO PRO PER, WILL BE DEALING WITH OUR OFFICE DIRECTLY AS OPPOSED TO THROUGH AN ATTORNEY. WHEN MR. ROBBINS IS FINISHED SIGNING THAT, I WOULD JUST REQUEST, IF I COULD, TO INFORM HIM OF A FEW THINGS.

THE COURT: YES.

MS. GRAVES: AND ASK HIM A FEW ADDITIONAL QUESTIONS ABOUT THE DECISION HE HAS MADE.

THE COURT: YES.

WOULD YOU LOOK THAT OVER, MR. ROBBINS. AND IF THAT FAIRLY REFLECTS WHAT YOU AND I HAVE TALKED ABOUT, IF YOU WOULD SIGN IT AND DATE IT, I WOULD APPRECIATE IT.

THE DEFENDANT: YES, SIR.

THE COURT: ALL RIGHT.

VERY GOOD.

IF YOU WILL HAND THAT BACK TO THE CLERK OR TO THE BAILIFF.

THE CLERK HAS HANDED TO ME THE RECORD OF THE FARETTA WARNINGS THAT I HAVE GIVEN TO MR. ROBBINS HERE TODAY. MR. ROBBINS HAS DATED AND SIGNED THAT RECORD.

AND BASED UPON HIS DOING SO, I AM GOING TO FIND THAT MR. ROBBINS HAS KNOWINGLY, INTELLIGENTLY, AND



VOLUNTARILY WAIVED HIS RIGHT TO BE REPRESENTED BY AN ATTORNEY AS TO THE CHARGES FILED AGAINST HIM, WHICH INCLUDE PENAL CODE SECTION 187(A), MURDER, AND PENAL CODE SECTION 487.3, THEFT.

I WILL THEREFORE RATE AND SIGN THIS RECORD AND ENTER THIS RECORD INTO THE PROCEEDINGS.

AND, MR. ROBBINS, YOU ARE HERewith AUTHORIZED TO REPRESENT YOURSELF IN PROPRIA PERSONA IN THIS MATTER.

THE DEFENDANT: THANK YOU, YOUR HONOR.

MR. SEIFER: PUBLIC DEFENDER IS RELIEVED, YOUR HONOR?

THE COURT: PUBLIC DEFENDER IS RELIEVED.

MR. SEIFER, IF YOU HAVE DOCUMENTATION THAT YOU CAN TURN OVER TO MR. ROBBINS, YOU MIGHT DO THAT NOW.

MR. SEIFER: YOUR HONOR, IF I MAY, I AM GOING TO GIVE MR. ROBBINS MY COPY OF THE PRELIMINARY HEARING, THE INFORMATION AND THE AMENDED INFORMATION, SOME INVESTIGATION REQUESTS WHICH WERE GENERATED BY ME, A MEDICAL REPORT FROM DR. JOHN MEAD.

MY COPY OF DR. EISENBERG'S REPORT I THINK WAS TAKEN BY THE COURT A FEW DAYS AGO FOR THE COURT FILE.

I HAVE SPECIAL MOTIONS HERE. I HAVE MISCELLANEOUS POLICE REPORTS AND SUPPLEMENTAL REPORTS THAT I AM GOING TO TURN OVER TO MR. ROBBINS AND THE RESULTS OF THE INVESTIGATION WORK WHICH WERE DONE BY THE PUBLIC DEFENDER'S OFFICE.

THE COURT: ALL RIGHT.

VERY GOOD.

NOW --

MR. SEIFER: EVERYTHING THAT I HAVE,  
YOUR HONOR, EXCEPT FOR MISCELLANEOUS  
NOTES AND DRAFT MATERIAL IN MY FILE.

THE COURT: VERY GOOD.

NOW, MR. ROBBINS, I AM GOING TO  
REQUEST THE SHERIFF OF LOS ANGELES  
COUNTY TO MAKE THE LIBRARY AVAILABLE TO  
YOU AND TO HOUSE YOU APPROPRIATELY.

THE DEFENDANT: YES, SIR.

THE COURT: YOU ARE ENTITLED TO A  
SMALL STIPEND, I BELIEVE \$40.

THE DEFENDANT: FOR LEGAL SERVICES,  
SUPPLIES, YES, SIR.

THE COURT: AND I WILL ALSO REQUEST  
THAT THAT BE PAID TO YOU AS SOON AS  
ARRANGEMENTS CAN BE MADE.

THE DEFENDANT: THANK YOU, YOUR  
HONOR.

THE COURT: VERY WELL.

MISS GRAVES, WOULD YOU CARE TO  
INQUIRE?

MS. GRAVES: JUST --

THE COURT: MR. SEIFER, YOUR RELIEVED.

MR. SEIFER: THANK YOU, YOUR HONOR.

MS. GRAVES: MS. ROBBINS, JUDGE SIMPSON  
HAS ALREADY INDICATED THAT YOU CAN GO  
PRO PER BECAUSE YOU HAVE THAT RIGHT TO  
REPRESENT YOURSELF.

BUT AS A REPRESENTATIVE OF THE  
DISTRICT ATTORNEY'S OFFICE WHO IS GOING  
TO BE PROSECUTING YOU, I JUST WANT TO  
MAKE SURE THAT YOU UNDERSTAND A FEW  
THINGS ABOUT THAT AND JUDGE SIMPSON MAY  
ALREADY HAVE MADE THESE THINGS  
PERFECTLY CLEAR TO YOU.

THE FIRST THING IS THAT MR. FAGAN, WHO YOU PROBABLY HAVE SEEN IN COURT, IS THE DISTRICT ATTORNEY ON THIS CASE. HE HAS BEEN THROUGH 4 YEARS OF COLLEGE, HE HAS BEEN THROUGH 3 YEARS OF LAW SCHOOL, HE HAS PASSED THE BAR EXAM, AND HE HAS BEEN A DISTRICT ATTORNEY FOR OVER 15 YEARS AND HAS TRIED OVER A 170 FELONY JURY TRIALS.

HE IS ONE OF THE BEST TRIAL ATTORNEYS THAT OUR OFFICE HAS. YOU ARE GOING TO HAVE TO REPRESENT YOURSELF AGAINST SOMEONE WHO IS MUCH MORE AWARE OF THE LAW THAN YOU ARE.

HIS IS SKILLED IN TERMS OF PRESENTATION BEFORE A JURY. BASICALLY KNOWS THE INS AND OUTS OF BEING IN A COURTROOM. THAT IS WHO YOU ALONE ARE

GOING TO BE MATCHED AGAINST WITHOUT AN ATTORNEY TO HELP YOU.

ARE YOU AWARE OF THAT?

THE DEFENDANT: YES, MA'AM.

MS. GRAVES: AND KNOWING THAT, YOU STILL WISH TO REPRESENT YOURSELF?

THE DEFENDANT: I HAVE NO CHOICE.

MS. GRAVES: YOU INDICATED WHEN JUDGE SIMPSON WAS ASKING YOU EARLIER THAT YOU HOPE -- THIS WAS A QUOTE, "I HOPE TO DO IT RIGHT THE FIRST TIME."

WELL, YOU ARE NOT GOING TO GET A SECOND CHANCE. IF YOU ARE CONVICTED, YOU DON'T GET TO COME BACK AND DO IT ALL OVER AGAIN BECAUSE YOU CONVICTED YOURSELF. YOU REPRESENTED YOURSELF. YOU GIVE UP THAT RIGHT. YOU ONLY GET TO DO IT ONE TIME WHETHER YOU DO IT RIGHT OR DO IT WRONG.



DO YOU UNDERSTAND THAT?

THE DEFENDANT: YES, MA'AM.

MS. GRAVES: AND YOU STILL WANT TO REPRESENT YOURSELF?

THE DEFENDANT: YES, MA'AM.

MS. GRAVES: WHEN YOU REPRESENT YOURSELF, I KNOW JUDGE SIMPSON HAS INDICATED THAT HE IS NOT GOING TO GIVE YOU ANY BREAKS. HE IS GOING TO TREAT YOU THE SAME WAY AS IF YOU WERE REPRESENTED BY AN ATTORNEY.

THE SAME THINGS GOES FOR OUR OFFICE. MR. FAGAN IS NOT GOING TO BACK DOWN AND CHANGE THE WAY HE TRIES THIS CASE BECAUSE YOU ARE REPRESENTING YOURSELF. HE IS GOING TO TRY IT AND BE JUST AS TOUGH. HE WILL DO EVERYTHING THAT HE CAN WITHIN THE ETHICAL BOUNDARIES TO PROSECUTE YOU AND YOUR

PRO PER IS NOT GOING TO CHANGE THE WAY HE PROSECUTES IT EITHER.

DO YOU UNDERSTAND THAT?

THE DEFENDANT: YES, MA'AM.

MS. GRAVES: AND YOU STILL WANT TO REPRESENT YOURSELF?

THE DEFENDANT: YES, MA'AM.

MS. GRAVES: FINALLY, WHEN YOU DO REPRESENT YOURSELF, YOU ARE ACTING AS YOUR OWN ATTORNEY AND THAT MEANS THAT ALL LEGAL MOTIONS NEED TO BE FILED IN A TIMELY FASHION AND IN WRITING.

WE ARE NOT GOING TO GIVE YOU BREAKS BECAUSE YOU REPRESENT YOURSELF BY WAIVING NOTICE OR WAIVING WRITTEN NOTICE. IF YOU MAKE MOTIONS IN THIS CASE, WE ARE GOING TO NEED THEM IN WRITING AND IN A PROPER FORM THAT CAN BE

SUBMITTED TO THE COURT AND WE ARE NOT GOING TO TREAT YOU ANY DIFFERENTLY.

DO YOU UNDERSTAND THAT?

THE DEFENDANT: YES, MA'AM.

MS. GRAVES: AND YOU STILL WANT TO REPRESENT YOURSELF KNOWING ALL OF THOSE THINGS THAT I TOLD YOU?

THE DEFENDANT: YES, MA'AM.

MS. GRAVES: THIS IS NOT GOING TO BE AN EQUAL MATCH.

THE DEFENDANT: I REALIZE THAT, MA'AM.

MS. GRAVES: AND GIVING UP YOUR RIGHT TO APPEAL EVEN IF YOU MAKE A MISTAKE OR MORE THAN ONE. IF YOU MAKE A MISTAKE EVERY DAY YOU ARE IN COURT, YOU CAN'T APPEAL.

THE DEFENDANT: IT'S THE ONLY CHANCE I GOT.

MS. GRAVES: THANK YOU,

THE COURT: VERY WELL.

WELL, LET'S PROCEED TO SET THE MATTER FOR PRETRIAL AND TRIAL. I DON'T THINK WE HAVE --

THE CLERK: YES, YOUR HONOR. WE HAVE A TRIAL SETTING OF APRIL 20TH, 50 OF 60.

THE COURT: APRIL 20?

THE CLERK: YES, YOUR HONOR.

THE COURT: IS WHAT?

THE CLERK: 50 OF 60.

THE COURT: 50 OF 60. THAT GIVES YOU SIX WEEKS TO BE READY FOR TRIAL.

IS THAT GOING TO BE ENOUGH?

THE DEFENDANT: SIX WEEKS APRIL 20TH?

THE COURT: YES.

THE DEFENDANT: THAT WOULD BE FINE FOR PRETRIAL, YOUR HONOR. I HAVE SOME MOTIONS I WISH TO ENTER WITH THE COURT

ON THAT DATE AND ON THAT DATE SET A TRIAL DATE IF THAT WOULD BE ACCEPTABLE.

THE COURT: WELL, FOR PURPOSES OF MOTIONS THEN, I WOULD LIKE TO MOVE THAT DOWN A LITTLE BIT EARLIER THAN SIX WEEKS.

MS. GRAVES: I WOULD ALSO MAKE THAT REQUEST. TYPICALLY PERHAPS WITHIN 30 DAYS OF TODAY'S DATE WE COULD HAVE A PRETRIAL DATE SET FOR MOTIONS AND THEN SEE HOW THE PROGRESS IS GOING.

THE COURT: I WOULD LIKE TO SET PRETRIAL FOR MOTIONS 30 DAYS OUT.

THE DEFENDANT: ALL RIGHT, YOUR HONOR.

THE COURT: ALL RIGHT.

WE WILL ESTABLISH THE DATE FOR PRETRIAL AS APRIL 9. THAT WILL BE A MONDAY. ALL RIGHT.

AND ANY SUCH MOTIONS, MR. ROBBINS, WILL HAVE TO BE FILED WITH ME AND WITH THE DISTRICT ATTORNEY'S OFFICE IN A TIMELY MANNER.

MR. SEIFER: THANK YOU.

THE DEFENDANT: THANK YOU.

MS. GRAVES: YOUR HONOR, BECAUSE MR. FAGAN HAS THE FILE, I DON'T KNOW WHAT TIME FRAME WE ARE DEALING WITH. WAS THERE A TRIAL DATE OF APRIL 20TH ALREADY SET?

THE COURT: I AM SO ADVISED THAT WE HAVE APRIL 20 AT 50 OF 60.

MS. GRAVES: PERHAPS WE COULD KEEP APRIL 20TH ON THE JURY TRIAL CALENDAR AS 50 OF 60. PRETRIAL OF APRIL 9TH WOULD GIVE MR. ROBBINS AN OPPORTUNITY TO SUBMIT MOTIONS. AND THEN AT THAT DATE MR. FAGAN COULD DETERMINE, DEPENDING UPON



THE READINESS OF MR. ROBBINS, WHETHER OR NOT TO CHANGE THAT.

THE COURT: I WOULD LIKE TO DO THAT. LEAVE THE TRIAL AT APRIL 20 WITH THE UNDERSTANDING THAT DEPENDING UPON WHAT HAPPENS AT THE MOTIONS --

THE DEFENDANT: FINE, YOUR HONOR.

THE COURT: AND IN FAIRNESS TO YOU, I AM TREATING YOU AS I WOULD ANY NEW COUNSEL ARRIVING ON THE SCENE.

THE DEFENDANT: YES, SIR.

THE COURT: I WILL GIVE YOU A CHANCE TO ASSESS THE SITUATION AND TELL ME ON THE 9TH OF APRIL WHETHER YOU THINK YOU ARE READY TO GO ON TRIAL ON THE 20TH OR WHETHER YOU WOULD LIKE TO HAVE A REASONABLE CONTINUANCE AT THAT TIME.

THE DEFENDANT: YES, YOUR HONOR.

THE COURT: ALL RIGHT.

VERY GOOD.

THE DEFENDANT: AM I ALSO ENTITLED TO HAVE ANY INVESTIGATIVE WORK DONE, YOUR HONOR? AND HOW WILL I HAVE SUBPOENAS READY TO GO?

THE COURT: NO, NOT UNLESS THE SHERIFF'S OFFICE HAS A FACILITY THAT IS ABLE TO ACCOMMODATE YOU ON THAT AND I DON'T KNOW THAT THEY DO.

THE DEFENDANT: I WAS UNDER THE IMPRESSION THAT I WAS ALLOWED CERTAIN AMOUNT OF MONEY TO HIRE AN INVESTIGATOR TO DO INVESTIGATIVE WORK.

MS. GRAVES: THAT'S CORRECT. JUST LIKE A PERSON WHO IS REPRESENTED BY A PUBLIC DEFENDER OR A PERSON IS REPRESENTED BY A 987 APPOINTMENT, THE SAME GUIDELINES APPLY TO A PRO PER.

BECAUSE HE IS INDIGENT, HE HAS A RIGHT TO SUBMIT ORDERS TO THE COURT REQUESTING THAT AN INVESTIGATOR BE APPOINTED AND REQUESTING CERTAIN FUNDS. AND THEN THE COURT JUST FOLLOWS THE SAME REGULATIONS.

BUT MR. ROBBINS IS GOING TO HAVE TO FILE THE APPROPRIATE ORDERS WITH THE COURT REQUESTING THOSE THINGS. ONCE THOSE PROCEDURAL RULES ARE COMPLIED WITH, THEN THE COURT COULD DO THAT.

THE COURT: IF YOU WILL FILE WITH ME THE REQUEST FOR THE APPOINTMENT OF A PRIVATE INVESTIGATOR FOLLOWING THE SAME RULES THAT I WOULD APPLY TO ANYONE ELSE MAKING SUCH A REQUEST, TENTATIVELY I WOULD AUTHORIZE UP TO \$5,000.

MS. GRAVES: I THINK WHAT JUST HAPPENED HERE IN THE COURT POINTS OUT

ONE OF THE PROBLEMS WITH BEING PRO PER. AND THAT IS THAT YOU HAD THIS IDEA THAT YOU COULD DO SOMETHING AND NO CLUE AS TO THE PROCEDURES AND POLICIES OF HOW TO DO IT.

WE ARE UNDER NO OBLIGATION TO TELL YOU HOW TO DO THESE THINGS AND YOU ARE GOING TO HAVE TO FIGURE OUT HOW TO THOSE THINGS ON YOUR OWN BECAUSE WE DON'T REPRESENT YOU AND THE JUDGE DOESN'T REPRESENT YOU.

THAT IS JUST ONE EXAMPLE OF THE PROBLEMS YOU ARE GOING TO BE RUNNING INTO ON THE WAY.

THE DEFENDANT: I REALIZE THE MESS I AM IN, YES.

MS. GRAVES: DO YOU STILL WANT TO REPRESENT YOURSELF?

THE DEFENDANT: YES, MA'AM.

MS. GRAVES: THANK YOU.

THE COURT: ALL RIGHT, MR. ROBBINS.

IS THERE ANYTHING ELSE?

THE DEFENDANT: THAT'S IT FOR TODAY,

SIR,

THE COURT: I WILL REMAND YOU TO CUSTODY AND SEE YOU ON APRIL 9TH.

THE DEFENDANT: THANK YOU, YOUR HONOR.

(AT 2:24 P.M., THE PROCEEDINGS WERE CONTINUED TO MONDAY, APRIL 9, 1990, AT 9:00 A.M.)

NORWALK, CALIFORNIA;

MONDAY, APRIL 16, 1990\*

11:10 A.M.

DEPARTMENT SOUTHEAST F HON. ROBERT  
W. ARMSTRONG,  
JUDGE

APPEARANCES:

THE DEFENDANT PRESENT IN PROPRIA PERSONA; KURT SEIFERT (sic), DEPUTY DISTRICT ATTORNEY OF LOS ANGELES COUNTY, REPRESENTING THE PEOPLE OF THE STATE OF CALIFORNIA.

(KAREN M. ANDERSON, OFFICIAL REPORTER.)

THE COURT: MR. ROBBINS, YOUR MATTER IS HERE FOLLOWING GRANTING OF YOUR AFFIDAVIT FILED IN JUDGE SIMPSON'S COURT. THIS COURT IS SIMPLY THE SUPERVISING COURT OF CRIMINAL MATTERS.



I HAVE BEEN TOLD YOU WANT TO CONTINUE THIS MATTER FOR 30 DAYS.

IS THAT RIGHT?

THE DEFENDANT: YES, SIR, PLEASE.

THE COURT: ALL RIGHT.

SO 30 DAYS FROM TODAY WOULD BE THE 16TH OF MAY.

SO WE WILL CONTINUE THE MATTER TO THE 16TH OF MAY IN DEPARTMENT P OF THIS COURT, IN JUDGE KALUSTIAN'S COURT, ON THE 6TH FLOOR. RICHARD KALUSTIAN.

THE DEFENDANT: YES, SIR.

THE COURT: THE MATTER WILL BE TRANSFERRED TO DEPARTMENT P.

ON THAT DAY, 30 DAYS FROM NOW, THE MATTER WILL BE ZERO OF TEN ON THAT DAY.

MR. SEIFER: THAT WOULD BE BEYOND THE 60 DAYS, SO IT WOULD BE AUTOMATICALLY ZERO OF TEN.

THE COURT: YOU UNDERSTAND YOU HAVE A RIGHT TO HAVE YOUR TRIAL WITHIN 60 DAYS OF THE DATE OF YOUR INITIAL ARRAIGNMENT. YOU ARE ASKING FOR THIS CONTINUANCE, AND I AM WILLING TO GRANT IT. BUT THE PEOPLE WOULD HAVE POSSIBLY -- THEY DON'T HAVE TO TAKE IT, BUT THEY WOULD HAVE THE POSSIBILITY OF DELAYING THE MATTER -- START OF THE TRIAL FOR AN ADDITIONAL TEN DAYS AFTER THE 16TH OF MAY.

DO YOU UNDERSTAND THAT?

THE DEFENDANT: YES, SIR.

THE COURT: THAT'S AGREEABLE WITH YOU?

THE DEFENDANT: YES, SIR.

THE COURT: TIME WAIVER NOTED, GOOD CAUSE APPEARING, THE MATTER WILL BE SET FOR TRIAL IN DEPARTMENT P ON THE 16TH OF MAY.

THE MATTER WILL BE ZERO OF TEN ON THAT DAY.

MR. SEIFERT: YOUR HONOR, IS THERE A PREVIOUS TRIAL DATE?

I WAS INFORMED TODAY WAS A PRETRIAL DATE, BUT I AM NOT SURE IF A TRIAL DATE HAD BEEN SET.

THE CLERK: I BELIEVE THERE WAS A DIFFERENT TRIAL DATE.

THE COURT: THE TRIAL DATE WAS SET FOR THE 20TH. SO THE TRIAL DATE OF THE 20TH IS VACATED.

MR. SEIFERT: OF THIS MONTH?

THE COURT: OF APRIL IS VACATED.

THE MATTER WILL BE RESET FOR TRIAL, ZERO OF TEN, ON THE 16TH OF MAY.

THE DEFENDANT: I HAVE A MOTION REQUESTING ADVISORY COUNSEL. WOULD I BE ABLE TO MAKE THAT MOTION WITH YOU, YOUR

HONOR, OR WOULD I HAVE TO WAIT UNTIL I WENT TO DEPARTMENT P?

THE COURT: YOU SHOULD -- LET'S SEE.

THE DEFENDANT: I JUST RECEIVED SOME -

THE COURT: I HAVEN'T SEEN THIS FILE.

ARE THERE SPECIAL CIRCUMSTANCES ALLEGED IN THIS CASE?

THE DEFENDANT: NO, SIR.

MR. SEIFERT: I BELIEVE NOT.

THE COURT: GENERALLY, IF YOU ARE IN PRO PER, YOU DON'T HAVE A RIGHT TO HAVE ADVISORY COUNSEL, UNLESS IT IS A MATTER OF WHERE THERE ARE SPECIAL CIRCUMSTANCES.

MR. SEIFERT: THERE AREN'T ANY.

THE COURT: SO I WILL SIMPLY DENY IT AT THIS TIME WITHOUT PREJUDICE; BUT YOU WANT TO RAISE THE MATTER AGAIN WITH

JUDGE KALUSTIAN, YOU CAN FILE A MOTION FOR ADVISORY COUNSEL AND SET IT FOR HEARING. BUT DON'T WAIT UNTIL THE TRIAL DATE TO DO THAT.

THE DEFENDANT: OKAY.

CAN WE SET A PRETRIAL DATE AND NOT A TRIAL DATE?

THE COURT: RIGHT.

LET'S SET A TWO-WEEK DAY FOR PRETRIAL.

WE WILL SET THAT FOR THE 2ND OF MAY, AND AT THAT TIME PREPARE YOUR MOTION.

SO I AM NOT REALLY RULING ON IT TODAY. MAKE YOUR MOTION THEN AND SEND A COPY TO THE PEOPLE AND LET THEM KNOW THAT YOU ARE GOING TO ASK FOR ADVISORY COUNSEL.

THE DEFENDANT: YES, YOUR HONOR. ON THE 2ND OF MAY.

THANK YOU, YOUR HONOR.

(PROCEEDINGS CONCLUDED.)



LOS ANGELES, CALIFORNIA;

WEDNESDAY, MAY 2, 1990\* 9:30 A.M.

DEPARTMENT NO. SE P HON. RICHARD P.  
KALUSTIAN, JUDGE

APPEARANCES:

THE DEFENDANT PRESENT IN COURT IN  
PROPRIA PERSONA; JAMES FAGAN, DEPUTY  
DISTRICT ATTORNEY OF LOS ANGELES  
COUNTY, REPRESENTING THE PEOPLE OF  
THE STATE OF CALIFORNIA.

(GLORIA J. HALL, OFFICIAL REPORTER.)

MR. FAGAN; THE TRIAL DATE IS MAY 16TH  
ON ROBBINS. I'D ASK TO HAVE THE  
DEFENDANT ORDERED OUT BECAUSE I HAVE  
ANOTHER CASE PENDING IN DEPARTMENT E  
TODAY.

THE COURT: PEOPLE VERSUS ROBBINS.  
TRIAL DATE IS 16 MAY. THIS IS THE PRETRIAL  
DATE.

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MR. ROBBINS, WILL YOU BE READY FOR TRIAL ON THE 16TH OF MAY?

THE DEFENDANT: NO, YOUR HONOR, I WON'T BE. I HAVE A REQUEST FOR A, AUTHORIZING A LEGAL RUNNER. JUDGE SIMPSON HAD AUTHORIZED AN INVESTIGATOR ON MARCH 9TH. I CONTACTED AN INVESTIGATOR AND HE SUBSEQUENTLY TOLD ME THAT THERE WAS NO AUTHORIZATION TO PAY HIM. SO I NEED TO GET AUTHORIZATION FOR AN INVESTIGATOR.

THE COURT: NO. YOU NEED TO PREPARE THE AUTHORIZATION FOR ME TO SIGN.

THE DEFENDANT: YES, SIR.

THE COURT: YOU ARE DEFENDING YOURSELF. SO YOU MAY HAVE EITHER EATEN UP A MONTH OF YOUR TIME NOT KNOWING WHAT TO DO. SO I WOULD SUGGEST THAT YOU FIGURE OUT WHAT TO DO.

IN ORDER FOR ME TO AUTHORIZE AN INVESTIGATOR, YOU HAVE TO PREPARE A COURT ORDER WHICH TELLS ME HOW MUCH YOU NEED TO SPEND AND WHY SO I CAN SIGN THE COURT ORDER.

THE DEFENDANT: WELL, I NEED AN INVESTIGATOR, SO I NEED A MINIMUM OF \$500.

THE COURT: DON'T JUST TELL ME. PREPARE THE ORDER SO I CAN SIGN IT.

THE DEFENDANT: YES, SIR.

ON MARCH 16TH, JUDGE ARMSTRONG DENIED A REQUEST FOR ADVISORY COUNSEL. I HAVE A PETITION FOR WRIT OF MANDATE PROHIBITION FOR THE COURT HERE, YOUR HONOR, AND A COPY.

THE COURT: MR. ROBBINS, IN THE FUTURE ALL MOTIONS SHOULD BE SENT IN WELL IN ADVANCE OF THE DATE. DON'T BRING THEM TO COURT ON THE DATE YOU ARRIVE. I CAN'T

READ THEM AND I CANNOT RULE ON THEM. I CAN'T DECIDE ON THEM.

THE DEFENDANT: YES, SIR.

THE COURT: SEND THEM IN.

THE DEFENDANT: I MAILED ONE LAST TIME TO JUDGE SIMPSON AND HE SAID HE DID NOT GET IT THROUGH THE MAIL. AND SO I FIGURED IT WOULD BE APPROPRIATE TO BRING IT TO COURT.

THE COURT: YOU CAN SEE THAT I CANNOT READ THE MOTIONS IF YOU BRING THEM IN NOW.

THE DEFENDANT: YES, SIR.

THE COURT: YOU HAVE GOT 6 OR 8 OR 10 PAGES. I HAVE GOT TO READ IT NOW. SEND THE MOTIONS IN EARLY. IF THEY DON'T COME, YOU CAN BRING A COPY WHEN YOU COME IN. OR CALL THE CLERK AND VERIFY THAT THE CLERK HAS RECEIVED A MOTION. THESE ARE

ALL YOUR RESPONSIBILITY, MR. ROBBINS. GOING PRO PER IS A GIANT PAIN FOR YOURSELF.

THE DEFENDANT: THAT'S WHY I HAVE BEEN ASKING FOR ADVISORY COUNSEL.

THE COURT: THE PROBLEM IS YOU EITHER GET TO GO PRO PER OR YOU HAVE A LAWYER. ADVISORY COUNSEL, COURTS AREN'T GENERALLY INCLINED TO GIVE A GUY PRO PER STATUS AND ADVISORY COUNSEL. YOU CAN SEE WHERE THE COURTS ARE REALLY NOT VERY INTERESTED IN GIVING YOU YOUR OWN PRO PER PLUS A PAID FOR LAWYER.

THE DEFENDANT: YES, SIR.

THE COURT: SO YOU MAY WELL BE STUCK THROUGH THIS TRIAL DEVELOPING YOURSELF. YOU HAVE SEEN THE COUNTY JAIL LAW LIBRARY, HAVEN'T YOU?

THE DEFENDANT: YES, SIR.



THE COURT: IT'S A REAL DELIGHT, ISN'T IT?  
ALL THE CASES YOU WANT ARE ALL TORN OUT,  
AREN'T THEY?

THE DEFENDANT: DEFINITELY, YOUR  
HONOR.

THE COURT: SO AS YOU ARE WENDING  
YOU WAY THROUGH, IF YOU ARE LOOKING UP  
LAW, YOU ARE NOT GOING TO ABLE TO FIND IT  
BECAUSE SOMEBODY HAS TORN IT OUT  
BEFORE YOU GOT THERE. AND YOU ARE  
GOING TO BE ASKING ME FOR TIME OR BOOKS  
OR SOMETHING ELSE, AND I AM NOT GOING TO  
BE INCLINED TO GRANT IT. SO AS A PRO PER,  
YOU ARE GOING TO HAVE TO GO THROUGH  
THIS FIELD OF LAND MINES.

THE DEFENDANT: IT'S BEEN A MESS SO FAR,  
YOUR HONOR.

THE COURT: IT'S GOING TO BE WORSE. I  
TELL YOU THIS BECAUSE I DON'T CARE

WHETHER YOU ARE PRO PER. THAT'S FINE,  
TOO. BUT IT'S GOING TO BE A REAL MESS FOR  
YOU. YOU ARE GOING TO REGRET THIS FOR A  
LONG TIME, NOT BECAUSE OF ANYTHING I AM  
GOING TO DO, JUST YOUR FELLOW PRISONERS  
DOWN IN THE COUNTY JAIL WHO HAVE  
VIRTUALLY DESTROYED THE LAW LIBRARY.

IF THEY HAD THE SAME INTEREST IN  
KEEPING THE LAW LIBRARY AS THE PEOPLE  
USING THE LIBRARY IN THIS COURTHOUSE, IT  
WOULD BE DIFFERENT. YOU'D BE ABLE TO  
FIND WHAT YOU WANT, GET TO IT, BUT THAT'S  
THE WAY IT IS.

I WILL TAKE A LOOK AT THIS. YOU ARE  
GOING TO NEED A CONTINUANCE OF YOUR  
TRIAL DATE.

MR. FAGAN, ANY OBJECTION TO THAT?

MR. FAGAN: YOUR HONOR, I AM NOT  
GOING TO OBJECT TO ONE MORE

CONTINUANCE, BUT THIS CASE HAS HAD A RATHER MIXED HISTORY.

THE ARRAIGNMENT WAS DECEMBER 19TH OF 1989. HOWEVER, THERE WAS ONE LONG DELAY IN THE CASE WHEN JUDGE TORRIBIO ON HIS OWN DECIDED THE DEFENDANT WAS 1368 WHICH IT TURNED OUT HE WASN'T. I BELIEVE THE COURT INDICATED HE'S BEEN PRO PER SINCE MARCH 9TH.

I DON'T THINK IT WOULD BE APPROPRIATE FOR ME TO OBJECT TO ONE MORE, ABOUT A 30 DAY CONTINUANCE, BUT I THINK AFTER THAT --

THE COURT: LET ME GIVE YOU MY POLICY, MR. FAGAN AND MR. ROBBINS, ON PRO PERS SO THAT EACH OF YOU UNDERSTAND THAT. I WILL GENERALLY GIVE A PRO PER TWO CONTINUANCES.

YOU CAN HAVE THIS ONE AND YOU CAN PROBABLY HAVE THE NEXT ONE FOR AT LEAST ABOUT 30 DAYS. BUT AT THE END OF THAT TIME, I HAVE GOT TO HEAR SOME VERY GOOD REASON TO CONTINUE THE CASE AGAIN OR YOU WILL BE SITTING HERE TRYING THE CASE.

THE DEFENDANT: YES, YOUR HONOR.

THE COURT: I WANT YOU TO REALLY HEAR ME, MR. ROBBINS, BECAUSE WHAT'S GOING TO HAPPEN IS AS YOU GO IN THE COUNTY JAIL LAW LIBRARY AND TRY TO GET YOUR STUFF TOGETHER AS A PRO PER IN JAIL, IT'S GOING TO BE EXCEEDINGLY DIFFICULT. YOU ARE GOING TO BE FRUSTRATED, MAD, UPSET.

AND EACH TIME YOU COME TO COURT, YOU WILL HAVE NOT DONE OR BEEN ABLE TO DO WHAT YOU WANT TO DO. AND YOU ARE GOING TO EXPECT ME TO CONTINUE THE CASE BECAUSE IT'S ALMOST IMPOSSIBLE AS A PRO

PER TO PREPARE YOURSELF A DESCENT DEFENSE, ESPECIALLY GIVEN THE LAW LIBRARY.

THE DEFENDANT: YES, YOUR HONOR.

THE COURT: SUPREME COURT COMMANDS THAT I LET YOU GO PRO PER IF YOU ARE REASONABLY WELL WIRED TOGETHER, AND YOU ARE. PERSONALLY, I WOULDN'T ALLOW IT, GIVEN THE COMPLEXITY OF THE LAW. THE SUPREME COURT COMMANDS ME TO DO THAT. BUT IT DOESN'T COMMAND ME TO CONTINUE THE CASE UNTIL YOU FIGURE YOU ARE READY. AND THAT'S THE BIGGEST PROBLEM AND THE DISPARITY OR THE DIFFERENCE BETWEEN WHAT YOU THINK OUGHT TO HAPPEN AND WHAT I THINK OUGHT TO HAPPEN.

I WILL GIVE YOU YOUR CONTINUANCE. AND IF NECESSARY, I WILL PROBABLY GIVE YOU ANOTHER CONTINUANCE. BUT AT THAT

POINT, WE ARE PROBABLY GOING TO STOP ABRUPTLY, AND WE ARE GOING TO BE IN TRIAL.

THE DEFENDANT: YES, YOUR HONOR. I HAVE A COPY OF THAT REQUEST FOR ADVISORY COUNSEL. WOULD THE COURT LIKE ONE FOR ITS FILE?

THE COURT: I AM SURE WE HAVE ONE IN THE FILE, DO WE NOT?

THE DEFENDANT: I DON'T KNOW, YOUR HONOR.

THE COURT: IN THE UNLIKELY EVENT THAT WE DON'T --

THE DEFENDANT: WHATEVER IS CONVENIENT TO THE COURT.

THE COURT: NO, WHATEVER IS CONVENIENT TO YOU. WANT TO MAKE IT AS EASY ON YOU AS THIS WHOLE PROCESS IS, SO YOU TELL ME WHAT DATE.



THE DEFENDANT: COULD WE SET A PRETRIAL DATE FOR 30 DAYS FROM THIS TIME, YOUR HONOR?

THE COURT: ALL RIGHT. AND I WILL SET A TRIAL DATE FOR ABOUT 30 DAYS PAST THAT.

MR. FAGAN: THAT'S FINE, YOUR HONOR.

THE COURT: THAT WILL BE BASICALLY TWO CONTINUANCES.

THE DEFENDANT: YES, YOUR HONOR.

THE COURT: YOU INDICATE WHICH DATE IT IS. THIRTY DAYS FROM NOW IS ABOUT JUNE 6TH FOR PRETRIAL.

THE DEFENDANT: FINE, YOUR HONOR.

THE COURT: PRETRIAL CONFERENCE IS SET FOR 6-6. LET'S MAKE IT JULY 6.

THE DEFENDANT: YES, YOUR HONOR.

THE COURT: AND THAT'S ZERO OF TEN.

THE DEFENDANT: YOUR HONOR, HOW WOULD YOU RECOMMEND I GET AN

INVESTIGATOR ON THE CASE? SHOULD I WAIT UNTIL I COME BACK?

THE COURT: ABSOLUTELY NOT BECAUSE YOU WILL BE WASTING ALL THAT TIME BETWEEN NOW AND JUNE 6TH. PREPARE A COURT ORDER FOR ME TO SIGN. I WILL GIVE YOU A COPY OF THE MINUTE ORDER IF THAT'S SUFFICIENT FOR HIM. BUT THE PROBLEM IS I AM NOT GOING TO SUGGEST HOW YOU DO ANYTHING. YOU ELECTED TO GO PRO PER AND THIS IS A VERY COMPLEX BUSINESS.

THE DEFENDANT: COULD I GET A MINUTE ORDER FOR THAT TODAY THEN?

THE COURT: YOU WILL GET A COPY OF THE MINUTE ORDER APPOINTING THE INVESTIGATOR. WHAT WAS HIS NAME?

THE DEFENDANT: MR. ZINK.

THE COURT: I WILL AUTHORIZE MR. ZINK \$500. THAT'S IN THE MINUTE ORDER. IF HE

DOESN'T ACCEPT THAT, THEN YOU ARE GOING TO HAVE TO PREPARE A COURT ORDER AUTHORIZING THE EXPENDITURE, AUTHORIZING NO MORE THAN \$500.

THE COURT: ALL THIS TAKES TIME.

THE DEFENDANT: YES, YOUR HONOR.

MR. FAGAN: YOUR HONOR, FOR THE RECORD, MAY I TAKE A TIME WAIVER, EVEN THOUGH THE DEFENDANT IS IN PRO PER?

THE COURT: CERTAINLY.

MR. FAGAN: MR. ROBBINS, YOU KNOW YOU HAVE GOT A RIGHT TO BE BROUGHT TO TRIAL WITHIN TEN DAYS OF MAY 16TH. YOU HAVE NOW ASKED FOR JULY 6TH. DO YOU GIVE UP YOUR RIGHT TO A NEW TRIAL?

THE DEFENDANT: YES, SIR.

MR. FAGAN: THANK YOU, YOUR HONOR.

THE COURT: I WILL BRING YOU OUT A LITTLE BIT LATER THIS MORNING WHEN I DECIDE ON THE WRIT OF MANDATE, OKAY?

THE DEFENDANT: OKAY.

MR. FAGAN: MR. MERRICK WILL STAND IN FOR ME, YOUR HONOR.

(SHORT RECESS.)

(MARC MERRICK, DEPUTY DISTRICT ATTORNEY OF LOS ANGELES COUNTY, STANDING IN FOR JAMES FAGAN.)

THE COURT: THIS IS PEOPLE VERSUS ROBBINS.

I HAVE READ YOUR PETITION FOR WRIT OF MANDATE AND ALSO YOUR ORIGINAL REQUEST FOR ADVISORY COUNSEL. PETITION FOR WRIT OF MANDATE IS DENIED. MR. ROBBINS, BY YOUR ANALYSIS, EVERY DEFENDANT WHO WENT PRO PER WOULD BE

AUTOMATICALLY ENTITLED TO ADVISORY COUNSEL.

THE DEFENDANT: I CAN'T HEAR, YOUR HONOR.

THE COURT: BY YOUR ANALYSIS, IF YOUR ANALYSIS WERE ACCEPTED BY THE COURT, EVERY PERSON ALLOWED TO GO PRO PER WOULD BE ENTITLED TO ADVISORY COUNSEL BECAUSE OF THE FACTORS YOU POINT OUT, RIGHT?

THE DEFENDANT: YES, SIR.

THE COURT: JUST CHATTING AMONG US PEOPLE HERE, WOULDN'T THAT INDUCE EVERY DEFENDANT TO GO PRO PER AND GET A PRE-ADVISORY LAWYER? IF I WERE A PRO PER, I'D SERIOUSLY THINK OF THAT.

I AM DENYING YOUR MOTION BECAUSE I HAVE EXERCISED MY DISCRETION AGAINST ADVISORY COUNSEL. THIS IS EXACTLY THE

PROBLEM YOU FACE WHEN YOU GO PRO PER AND YOU ARE IN THE COUNTY JAIL. THERE IS ALWAYS A DISPUTE BETWEEN YOU AND THE LAW LIBRARY, THE SHERIFF, WHOEVER, ABOUT WHETHER OR NOT THE FACILITIES ARE ADEQUATE FOR YOUR NEEDS. AND IT'S SOMETHING YOU HAVE CHOSEN TO DO.

YOU HAVE A RIGHT TO A FREE LAWYER. YOU HAVE BEEN GIVEN A FREE LAWYER. IF YOU WANT ONE, YOU CAN HAVE ONE. BUT I AM NOT GOING TO GIVE YOU ADVISORY COUNSEL.

YOUR PETITION FOR WRIT OF MANDATE IS DENIED.

(CASE CONTINUED TO JULY 6, 1991, 9:00 A.M.)



Lee Robbins  
441 Bauchet St.  
Los Angeles, CA 90012

Filed  
July 06, 1990  
Frank S. Zolin,  
County Clerk  
By B. Smith, Deputy

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF LOS ANGELES

PEOPLE OF THE STATE	) CASE #A481636
OF CALIFORNIA,	)
	) NOTICE OF MOTION
Plaintiff,	) FOR CONTINUANCE,
	) DECLARATION IN
v.	) SUPPORT OF MOTION
	)
LEE ROBBINS,	)
	)
Defendant.	)
	)
	)

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TO: THE DISTRICT ATTORNEY OF LOS ANGELES COUNTY, PLEASE TAKE NOTICE that on July 6, 1990 at 9 am in Department "P", Defendant LEE ROBBINS will move the court to grant a continuance of the trial now set for July 6, 1990, and that the continuance be for a period of not less than 45 calendar days.

This motion is based on this notice, the pleadings, files and records in this action, the declaration and memorandum of points and authorities filed in support of this motion, and on evidence that may be addressed at the hearing on the matter.

Dated: June 28, 1990

Lee Robbins  
Defendant Pro Per

## MOTION FOR CONTINUANCE

I, LEE ROBBINS, DO HEREBY DECLARE:

THAT this case is presently set for July 6, 1990 in Dept. "P" of Norwalk Superior Court:

THAT a continuance of the trial for at least 45 calendar days is necessary because;

DUE TO THE COMPLEXITY OF THIS CAPITAL CASE, defendants lack of skill, resources, co-counsel, or advisory counsel, the defendant will require the additional requested time to adequately prepare.

PEO-V-HILL (1983) 48 CA 3d 744, 758, 196 CR 382, 391. PRO PER DEFENDANT MOTION FOR CONTINUANCE to prepare for trial denied, case reversed because defendant denied his right to effective representation.

THE RIGHT TO COUNSEL, U.S. CONST. ART. VI: CAL. CONST. ART. 1 & 15 includes the right to adequately prepare a defense.

PEO V. MADDOX (1967) 67 C2d 647, 652, 63 CR 371, 374. Including the right to prepare, above motions and objections before, during, and after trial. Cooper v. Sup. Ct. (1961) 55 C2d 291, 302, 10 CR 842, 849

PEO V. SARAZZAWSKI (1945) 27 C2d 717, 161 P2d 934, 939.

THE COURT HAS DISCRETION TO PERMIT AN INDIGENT defendant an attorney advisor and may have a duty to appoint advisory counsel if it determines that defendants waiver is intelligently made but that defendant lacks the skill to defend the case.

PEO-V-BIGLOW (1984) 37C3D 731, 742, 209 CR 328, 333. (Abuse of discretion by court to appoint advisory

counsel in capital case.) A.C. 987.9 sub(d). DRESCHER-V-SUP. CT. (1990) 267 CR 661.

THE DEFENDANT PRAYS THAT THE COURT IN ITS infinite wisdom will allow the defendant the opportunity to prepare an adequate defense by granting more time, the assistance of advisory counsel, funds for a forensic expert, and additional funds for the continuing investigation.

Defendant investigator needs additional time and funds to complete his investigation.

The investigators findings are expected to show additional evidence crucial to the defense when coupled with the experts findings in reconstructing the murder.

The experts findings are expected to disprove the prosecutors case and expedite the trial by removing all doubt as to the defendants innocence.

Counsel must specify the testimony he expects from a witness. PEO-V-AH FAT (1874) 48 C 61, 63. Then Counsel must show that this testimony has a legitimate tendency to prove or disapprove a fact that could influence the decision in the case. PEO-V-DUNSTAN (1922) 59 CA 574, 584, 211 P 813, 817.

If the court wishes more detailed information relative to these requests the defendants requests an in camera hearing.

PEO-V-CRUZ (1978) 83 CA3d 308, 324, 147 CR 740, 749.

PEO-V-WORTHY (1980) 109 CA3d 514, 522 N2, 167 CR 402, 407 N2.

## THE DEFENSE REQUESTS:

Additional time to prepare;

Funds for appointment of forensic expert;

Funds for appointment of advisory counsel;

Additional funds for continuing investigation.

The defendant prays these requests be granted, and that the court "shall be guided by the need to provide a complete and full defense for the defendant" Penal Code sec 987.9

The defendant is willing to waive time for the purpose of these requests.

Executed this 28th day of June 1990, at Los Angeles, CA.

I declare under penalty of perjury that the forgoing is true and correct.

Lee Robbins  
Defendant Pro Per

[Document not stamped  
"Filed"]

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

Lee Robbins	)	No. _____
(Petitioner)	)	(To be supplied by Clerk of the Court)
	)	
vs.	)	Petition for Writ of <u>Habeas Corpus</u>
	)	
L.A. COUNTY	)	Name of person in custody:
JAIL	)	_____
	)	(If other than petitioner)
_____	)	
(Respondent)	)	Relationship of petitioner to person
	)	in custody _____
	)	_____

INSTRUCTIONS - READ CAREFULLY

Set forth in concise form the answers to each applicable question. If you do not know the answer to any question, you should so state. If necessary, you may finish the answer to a particular question on an additional blank page, but make it clear to which question any such continued answer refers.

You should exercise care to assure that all answers are true and correct. Since the petition contains a verification, the making of a statement which you know is false may result in a conviction for perjury.



When the petition is filed with the Superior Court or judge thereof, only the original must be filed unless additional copies are required by local court rules.

When the petition is filed with the Court of Appeal or judge thereof, an original and three copies must be filed.

When the petition is filed with the Supreme Court or judge thereof, an original and ten copies must be filed.

In addition, the law requires the service of a copy of the petition on the district attorney, city attorney or city prosecutor in certain cases (Pen. Code, § 1475; Gov. Code, § 72193).

Petitioner should attach all relevant records of documents supporting his claims. [As amended effective Nov. 11, 1966.]

1. LEE ROBBINS in whose behalf the writ is applied

(Name of person in custody)

for is confined or restrained of his liberty at Los Angeles

County Jail

by Los Angeles County Sheriff

(Name of person or persons having custody-if names not known describe such person or persons)

2. Name and location of court under whose process person is confined:

Norwalk Superior Court

12720 Norwalk Blvd.

Norwalk, CA 90650

3. Nature of the court proceeding (e.g., criminal case, commitment for narcotics addiction, insanity, or mentally disordered or abnormal sex offender) and the case number, if known, resulting in the confinement: A481636

- \_\_\_\_\_
4. The date of the judgment, or order or decree for confinement and its terms: \_\_\_\_\_

Pre Trial Proceedings

5. What plea was entered in the above proceeding? (E.g., guilty, not guilty by reason of insanity, nolo contendere, etc.)

Not Guilty

6. Check whether trial or hearing was by

- (a) A jury  
(b) A judge without a jury

7. Was an appeal taken?

8. If you answered "yes" to (7), list

(a) The name of each court to which an appeal was taken:

i \_\_\_\_\_

ii \_\_\_\_\_

iii \_\_\_\_\_

(b) The result in each such court:

i \_\_\_\_\_

ii \_\_\_\_\_

iii \_\_\_\_\_

(c) The date of each such result and, if known, citations of any written opinion or orders entered:

i \_\_\_\_\_

ii \_\_\_\_\_

iii \_\_\_\_\_

9. If the answer to (7) "no" state the reasons for not so appealing:

\_\_\_\_\_

\_\_\_\_\_

10. State concisely the ground on which you base your allegation that the imprisonment or detention is illegal:

(a) I am being denied counsel, and hereby

(b) Request that an attorney be appointed

(c) To Represent me.

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) I was forced to choose between Mr. Seifer who said I

(b) would be convicted if I went to trial and going pro-per, I

(c) have been unable to get any pre-trial motions granted (People v. Cruz 83 Cal.App.3d

12. Have any other applications, petitions or motions been filed or made in regard to the same detention or restraint?

Yes

13. If you answered "yes" to (12), list with respect to each petition, motion or application:

(a) The specific nature thereof:

i Motion for advisory counsel, co-counsel or the alternative counsel.

ii \_\_\_\_\_

iii \_\_\_\_\_

iv \_\_\_\_\_

(b) The name and location of the court in which each was filed:

i Norwalk Superior Court

ii \_\_\_\_\_

iii \_\_\_\_\_

iv \_\_\_\_\_

(c) The deposition thereto.

i Denied

ii \_\_\_\_\_

iii \_\_\_\_\_

iv \_\_\_\_\_

(d) The date of each such disposition:

i May 2, '990

ii \_\_\_\_\_

iii \_\_\_\_\_

iv \_\_\_\_\_



(e) If known, citations of any written opinions or orders entered pursuant to each such disposition:

i \_\_\_\_\_

ii \_\_\_\_\_

iii \_\_\_\_\_

iv \_\_\_\_\_

14. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, or application? No

15. If you answered "yes" to (14), identify:

(a) Which grounds have been previously presented:

i \_\_\_\_\_

ii \_\_\_\_\_

iii \_\_\_\_\_

(b) The proceedings in which ground was raised:

i \_\_\_\_\_

ii \_\_\_\_\_

iii \_\_\_\_\_

16. If any ground set forth in (10) has not previously been presented to any court, state or federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) \_\_\_\_\_

This court has jurisdiction

(b) \_\_\_\_\_

(c) \_\_\_\_\_

17. In the proceeding resulting in the confinement complained of, was there representation by an attorney at any time during the course of:

(a) The proceedings prior to trial? Ralph Seifer,  
D.D.

(b) The trial or hearing? NA

(c) The sentencing or commitment? \_\_\_\_\_

(d) An appeal? \_\_\_\_\_

(e) The preparation, presentation or consideration or any petitions, motions or application with respect to this conviction? NA

18. If you answered "yes" to one or more part of (17), list the name and address of each such attorney and the proceeding in which he appeared:

(a) Ralph Seifer Norwalk Public Defender

Offender Office

12720 Norwalk Blvd

(b) Norwalk, CA 90650

(c) \_\_\_\_\_

19. Is the person in custody presently represent by an attorney in any matter relating to this confinement?

No

If so, state the attorney's name and address: \_\_\_\_\_

\_\_\_\_\_

20. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:

NA

I, the undersigned, say:

I am the petitioner in this action; the above document is true of my own knowledge, except as to matters that are stated in it on my information and belief, and as to those matters I believe it to be true.

Executed on 13 July 1990 at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Lee Robbins

(Signature)

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NORWALK, CALIFORNIA;

FRIDAY, JULY 13, 1990\*

9:07 A.M.

DEPARTMENT SOUTHEAST F HON. ROBERT W.  
ARMSTRONG,  
JUDGE

APPEARANCES:

THE DEFENDANT PRESENT IN PROPRIA  
PERSONA; JAMES FAGAN, DEPUTY DISTRICT  
ATTORNEY OF LOS ANGELES COUNTY,  
REPRESENTING THE PEOPLE OF THE STATE  
OF CALIFORNIA.

(KAREN M. ANDERSON, OFFICIAL  
REPORTER.)

THE COURT: THE MATTER OF PEOPLE  
VERSUS LEE ROBBINS.

THIS MATTER IS HERE FOR TRIAL  
TODAY SEVEN OF TEN. MONDAY WILL BE THE

TENTH DAY FOR THE MATTER TO PROCEED TO TRIAL.

I HAVE A MOTION FILED FOR CONTINUANCE. HOWEVER, THE MOTION SIMPLY CITES A LOT OF CASES AND REALLY DOES NOT GIVE ANY REASON FOR A CONTINUANCE, OTHER THAN THE FACT THAT YOU ARE PRO PER AND YOU HAVEN'T BEEN TRAINED AS A LAWYER.

BUT, OF COURSE, IF I GAVE YOU A CONTINUANCE, YOU ARE NOT GOING TO GO TO LAW SCHOOL BETWEEN NOW AND THAT TIME, ANYWAY, AND WON'T BE ANY MORE CAPABLE OF REPRESENTING YOURSELF 45 DAYS DOWN THE LINE THAN YOU ARE NOW.

PLUS THE FACT, I THINK IT WAS MADE CLEAR TO YOU BEFORE WHILE THE MATTER WAS IN JUDGE KALUSTIAN'S COURT THAT THE MATTER IS GOING TO PROCEED TO TRIAL. THIS

IS THE OLDEST CASE IN THE BUILDING. WE GENERALLY TRY CASES WITHIN 60 DAYS. SOMETIMES THEY GO 90. THIS CASE IS NOW SEVEN MONTHS OLD, AND IT'S GOING TO PROCEED TO TRIAL.

SO MONDAY YOU SHOULD COME TO COURT PROPERLY DRESSED BECAUSE WE ARE GOING TO START YOUR JURY TRIAL ON MONDAY.

THE MOTION FOR CONTINUANCE IS DENIED.

THE DEFENDANT: I BELIEVE THERE IS A COUPLE OTHER MOTIONS THERE I WOULD LIKE TO HAVE REHEARD; A MOTION FOR ADVISORY COUNSEL AND ALSO A MOTION FOR -- HITCH/TROMBETTA MOTION.

THE COURT; AS FAR AS I KNOW, THOSE MOTIONS HAVE BEEN HEARD.



THE DEFENDANT: YES. I WOULD LIKE TO HAVE THEM REHEARD, YOUR HONOR.

THE COURT: YOU DON'T DO THAT. ONCE A MOTION IS HEARD, THEN YOU DON'T TRANSFER TO ANOTHER COURT AND ASK TO START ALL OVER AGAIN.

THAT'S CALLED RES JUDICATA. IT'S BEEN DECIDED. THEREFORE, YOU DON'T GET A REHEARING ON IT. YOU HAVE MADE YOUR RECORD; AND IF IT WAS ERROR TO DENY THE MOTION, THEN YOU HAVE MADE YOUR RECORD ON APPEAL. AND YOU CAN RAISE IT WITH THE APPELLATE COURT, BUT YOU CAN'T RETRY AND RELITIGATE THE SAME THINGS IN THE TRIAL COURT OVER AND OVER AGAIN.

THE DEFENDANT: ALL RIGHT.

I ALSO HAVE A MOTION TO DISMISS AND WRIT OF HABEAS CORPUS I WOULD LIKE TO FILE WITH THE COURT TODAY, TOO.

THE COURT: IT'S NOT AN APPROPRIATE TIME A FOR WRIT OF HABEAS CORPUS. A WRIT OF HABEAS CORPUS IS TO PRODUCE YOUR BODY IN COURT. SO YOU HAVE HABEAS CORPUSED. SO YOUR BODY IS HERE. IT'S NOT APPROPRIATE AT THIS TIME.

THE HABEAS CORPUS IS DIRECTED TO EITHER IF A PERSON IS HELD IMPROPERLY IN CUSTODY, OR IF HE HAS BEEN IMPROPERLY CONVICTED AND NEW GROUNDS HAVE COME UP THAT WERE NOT RAISED IN THE APPELLATE COURT. THERE ARE ALL KINDS OF BRINGING A HABEAS CORPUS, BUT NOT ON THE DAY OF TRIAL. YOU ARE BEFORE THE COURT.

THE DEFENDANT: I HAVE A MOTION TO DISMISS I WOULD LIKE TO HAVE HEARD.

THE COURT: WELL, AGAIN, IT'S NOT THE APPROPRIATE TIME TO FILE A MOTION TO DISMISS.

ON WHAT GROUNDS IS THE MOTION TO DISMISS?

THE DEFENDANT: INCOMPETENCY OF THE DEFENSE COUNSEL AND MISCONDUCT BY THE PROSECUTOR.

THE COURT: ALL RIGHT.

THIS, AGAIN, IS NOT -- AS FAR AS THE INCOMPETENCY OF DEFENSE COUNSEL, YOU ARE IN PRO PER. ARE YOU TALKING ABOUT YOUR OWN INCOMPETENCY?

THE DEFENDANT: NO. AT THE PRELIMINARY HEARING, YOUR HONOR.

THE COURT: THAT'S A MATTER THAT'S ALSO -- THE PRELIMINARY TRANSCRIPT IS HERE AND IS SOMETHING TO BE PRESERVED AS AN APPELLATE RIGHT, BUT NOT AT THIS TIME. AT THIS TIME THE MATTER IS HERE FOR TRIAL.

AS FAR AS THE MOTION TO DISMISS IS CONCERNED, IT'S PREMATURE. AT THE CLOSE

OF THE PEOPLE'S CASE AND AT ANY TIME AFTER THE PEOPLE HAVE FINISHED PRESENTING THEIR EVIDENCE, YOU CAN MAKE A MOTION UNDER 1118 IF THE EVIDENCE IS INSUFFICIENT TO GO TO THE JURY.

IF I AGREE AND I GRANT -- I GRANT 1118 MOTIONS IN LOTS OF CASES, BUT I HAVEN'T HEARD THIS EVIDENCE SO I DON'T KNOW. BUT IF, IN FACT, THERE IS INSUFFICIENT EVIDENCE FOR THE MATTER TO GO TO A JURY, THEN A MOTION TO DISMISS CAN BE MADE AFTER THE PEOPLE HAVE PUT ON THEIR EVIDENCE. BUT I DON'T KNOW ANYTHING ABOUT THIS CASE EXCEPT THE CHARGE, SO I AM CERTAINLY NOT IN THE POSITION.

THE DEFENDANT: THAT'S WHY I WANT THE MOTION HEARD.

THE COURT: THAT'S WHAT THE TRIAL IS ABOUT. WE WILL PUT ON THE EVIDENCE; AND

AFTER THE WITNESSES HAVE TESTIFIED, THEN EVERYBODY WILL KNOW WHAT THE TRIAL IS ABOUT. THEN IF YOU WANT TO MAKE AN 1118 MOTION, I CAN PROPERLY ADDRESS IT; BUT RIGHT NOW, IN A VACUUM, I DON'T KNOW WHAT THE FACTS ARE IN THE CASE, OTHER THAN WHAT THE CHARGE IS.

THE DEFENDANT: ALL RIGHT.

THE COURT: SO THE MATTER WILL BE HERE FOR TRIAL.

WHAT ABOUT CLOTHES? DO YOU HAVE APPROPRIATE CLOTHING TO WEAR?

THE DEFENDANT: NO, SIR. WHEN I WAS BROUGHT FROM ARKANSAS, I WAS FLOWN OUT IN MY LONG UNDERWEAR AND T-SHIRT.

THE COURT: SO YOU DON'T HAVE ANY CLOTHING AT THE JAIL?

THE DEFENDANT: NO, SIR, I DON'T.

THE COURT: ALL RIGHT.

WE WILL SEE TO IT THERE IS CLOTHING AVAILABLE FOR YOU ON MONDAY.

YOU WOULD PREFER, I TAKE IT, TO APPEAR IN REGULAR CIVILIAN CLOTHES RATHER THAN JAIL BLUES?

THE DEFENDANT: YES, SIR, I WOULD.

WHAT ABOUT SOME SUBPOENAS, YOUR HONOR? WOULD I GIVE THEM TO THE COURT CLERK FOR DELIVERY?

THE COURT: ORDINARILY, YOU WOULD GIVE SUBPOENAS TO THE SHERIFF; BUT IF YOU HAVE SUBPOENAS MADE OUT THAT NEED TO BE SERVED -- YES, IF YOU WILL GIVE THEM TO US, WE WILL SEE THAT THEY RE DELIVERED.

MR. FAGAN: YOUR HONOR, I HAVE ONE ADDITIONAL MATTER.

MR. ROBBINS HAD FILED A MOTION UNDER SECTION 1538.5. I REALLY DON'T THINK THERE IS ANYTHING IN THIS CASE FOR HIM TO



SUPPRESS, BUT HE WAS SUPPOSED TO PROVIDE ME WITH A LIST OF WHAT ITEMS HE WANTED SUPPRESSED SO I COULD HANDLE THAT. HE HAS NOT DONE THAT YET.

I BELIEVE, IF HE WILL PROVIDE ME WITH THE LIST, THE MATTER OF THE 1538 WILL BE MOOT. I DON'T THINK ANYTHING HE WANTS SUPPRESSED WILL BE USED IN THE TRIAL, BUT I DON'T KNOW BECAUSE I DON'T KNOW WHAT IT IS HE IS TRYING TO SUPPRESS.

THE COURT: AS MR. FAGAN SAYS, YOU CAN'T ADDRESS THE MOTION TO SUPPRESS UNLESS WE KNOW WHAT IT IS THAT'S BEING SOUGHT TO BE SUPPRESSED.

THE DEFENDANT: ALL THE ITEMS TO BE SUPPRESSED WERE CONTAINED IN THE RETURN TO WARRANT AND INVENTORY RECORDS, AS I MENTIONED IN THE MOTION TO SUPPRESS.

MR. FAGAN: THEN YOU HAVE NOTHING TO SUPPRESS OTHER THAN WHAT'S INVOLVED IN THE SEARCH WARRANT; IS THAT CORRECT?

THE DEFENDANT: YES.

MR. FAGAN: FINE.

NONE OF THAT STUFF IS IMPORTANT, AND I DON'T THINK WE HAVE TO HEAR THE MOTION.

THE COURT: ALL RIGHT.

IF IT'S NOT GOING TO BE USED, THEN IT'S MOOT.

SO WE WILL BE READY TO PROCEED ON MONDAY. THIS COURT WILL BE OPEN, AND WE WILL BE PREPARED TO TRY THE CASE ON MONDAY.

OKAY.

(A RECESS WAS TAKEN WHILE THE COURT HANDLED OTHER MATTERS.)

THE COURT: IN THE LEE ROBBINS MATTER.



I WILL ASK THE DISTRICT ATTORNEY TO  
LEAVE THE ROOM.

MR. FAGAN: FINE, YOUR HONOR.

(THE FOLLOWING PROCEEDINGS WERE  
HELD IN OPEN COURT OUT OF THE  
PRESENCE OF THE DEPUTY DISTRICT  
ATTORNEY:)

THE COURT: IN THE MATTER OF PEOPLE  
VERSUS ROBBINS.

I ASKED THE PROSECUTOR TO LEAVE  
THE ROOM.

I HAVE BEEN GIVEN THESE SUBPOENAS.

THE ONE SUBPOENA IS FOR A CIVILIAN  
WITNESS. WE WILL ATTEMPT TO GET SERVICE  
ON THAT PERSON.

ONE OF THE DEPUTIES, THE  
INVESTIGATING OFFICER -- WHAT'S THE NAME  
OF THAT OFFICER THAT'S RETIRED?

THE BAILIFF: BARRY JONES.

THE COURT: BARRY JONES IS RETIRED  
FROM THE SHERIFF'S OFFICE. HE NO LONGER  
IS EMPLOYED BY THE SHERIFF'S OFFICE. WE  
DON'T KNOW WHERE HE IS. WE HAVE NO  
ADDRESS FOR HIM.

THE DEFENDANT: OKAY, SIR.

THE COURT: HE IS AN INVESTIGATING  
OFFICER, BUT HE IS ONLY ONE OF THE  
INVESTIGATING OFFICERS. BUT SINCE HE NO  
LONGER WORKS, IT'S NOT THE INTENTION OF  
THE PEOPLE TO CALL HIM; AND I DON'T KNOW  
OF ANY WAY THAT I CAN REACH HIM.

THE OTHER OFFICER THAT YOU HAVE  
ASKED FOR IS THE OFFICER WHO TOOK THE  
PHOTOGRAPHS OF THE CRIME SCENE, JUST THE  
PHOTOGRAPHER. THERE IS NO NECESSITY FOR  
HAVING THE PHOTOGRAPHER IN COURT, THAT  
I CAN SEE, BECAUSE OTHER OFFICERS THAT

WERE CAN SAY THESE WERE ACCURATE REPRESENTATIONS.

AND THE PHOTOGRAPHER JUST DOES WHAT OTHER OFFICERS DIRECT HIM TO TAKE. THEY SHOOT THIS, SHOOT THAT.

THE DEFENDANT: YES, SIR.

THE COURT: THEY TELL HIM TO TAKE THE PICTURES, AND HE PUSHES THE BUTTON AND SNAPS THE PHOTOGRAPH.

THE DEFENDANT: I REALIZE THAT, BUT HE IS ALSO THE ONE WHO HANDLED THE FINGERPRINTS AT THE SCENE OF THE CRIME.

THE COURT: THE SAME OFFICER THAT DID -- NO. THE PRINT MAN IS SEPARATE. THE PRINT MAN IS COMING IN.

THE DEFENDANT: IF THE PRINT MAN IS COMING IN, THAT'S FINE. IT WAS MY UNDERSTANDING, FROM READING THE INCIDENT LOG AT THE SCENE, THAT DEPUTY

ROTTLER WAS ALSO THE ONE WHO HANDLED THE PRINTS.

THE COURT: I WAS INQUIRING OF THE PROSECUTOR AS TO THE OFFICERS -- THERE IS DUPLICATION. SOME OF THE OFFICERS YOU ARE ASKING FOR THE PEOPLE ARE BRINGING IN, ANYWAY. THE PRINT MAN IS ONE OF THE PEOPLE THAT THE PROSECUTOR IS DEFINITELY BRINGING IN. THE ONE WHO HANDLED THE LATENTS AND PRINTS IS GOING TO BE HERE. SO YOU GOT THAT COVERED.

THE DEFENDANT: YES, SIR.

THE COURT: ALL RIGHT.

NOW, THE CIVILIAN WITNESS --

THE DEFENDANT: DONNA MEDINA.

THE COURT: WE ARE GOING TO MAKE AN EFFORT TO SERVE HER. IT'S HARD TO DO IT ON LAST-MINUTE NOTICE, BUT WE AT LEAST CAN EXTEND -- THERE IS NO -- THE PEOPLE DON'T

PLAN TO CALL HER; AND SO, THEREFORE, WE DON'T HAVE TO HAVE HER HERE ON MONDAY. WE COULD SUBPOENA HER IN FOR WEDNESDAY, AND THAT WOULD BE TIME ENOUGH FOR YOU TO CALL HER AS A DEFENSE WITNESS.

APPARENTLY, THE LADY THAT YOU ASKED TO HAVE SUBPOENAED IS ON THE PEOPLE'S LIST, AS WELL.

THE DEFENDANT: FINE.

THE BAILIFF: I WILL DOUBLE-CHECK THAT WITH MR. FAGAN TO MAKE SURE.

THE COURT: FINE.

THE BAILIFF: IF SHE IS NOT, WE WANT HER HERE ON WEDNESDAY, THE 18TH?

THE COURT: RIGHT.

BUT, APPARENTLY, THEY WILL HAVE ALL OF THE WITNESSES HERE, ACCORDING TO THE CLERK.

ALL RIGHT. WE WILL DOUBLE-CHECK AGAIN.

(PROCEEDINGS CONCLUDED.)

NORWALK, CALIFORNIA;

THURSDAY, AUGUST 9, 1990\*

9:28 A.M.

DEPARTMENT SOUTHEAST H HON. ROBERT  
W. ARMSTRONG,  
JUDGE

(APPEARANCES AS HERETOFORE NOTED.)

THE COURT: MR. ROBBINS, THIS MATTER IS  
HERE FOR HEARING ON YOUR MOTION.

I HAVE READ YOUR MOTION UNDER 995  
OF THE PENAL CODE. I CAN TELL YOU THE  
FAULT OF THE MOTION IS THIS:

I REALIZE YOU ARE NOT AN ATTORNEY,  
SO YOU'RE NOT ACQUAINTED WITH WHAT THE  
PROCEDURE IS. BUT A 995 MOTION REQUIRES  
ME TO REVIEW THE MAGISTRATE'S WORK AND  
TO SEE IF HE MADE A MISTAKE IN HOLDING  
YOU TO ANSWER. THE ONLY THING THAT I  
CAN DO TO RULE ON THIS IS TO LOOK AT THE

[THIS PAGE INTENTIONALLY LEFT BLANK]



FOUR CORNERS OF THE TRANSCRIPT. SO I READ THE TRANSCRIPT IN ITS ENTIRETY.

IN THE TRANSCRIPT THERE ARE -- THERE IS EVIDENCE WHICH YOU BRING UP HERE. NOW, TO GIVE YOU AN EXAMPLE, YOU SAY THAT THE OFFICER PERJURED HIMSELF BY TESTIFYING THAT HE WAS PRESENT AT THE AUTOPSY; AND THE AUTOPSY SURGEON'S REPORT, WHICH HAS BEEN FURNISHED TO YOU, SAYS THAT NO ONE ELSE WAS PRESENT, SO THAT'S NOT SO.

I HAVEN'T SEEN THE AUTOPSY REPORT. IT'S NOT BEFORE ME. AND EVEN IF IT WERE BEFORE ME, I CAN'T CONSIDER IT ON A MOTION FOR 995. I CAN ONLY SEE WHAT THE MAGISTRATE SAW. THE MAGISTRATE DIDN'T HAVE THE AUTOPSY REPORT. IT WASN'T BEFORE HIM.

I AM GIVING YOU THAT AS AN EXAMPLE.

AND THE MAGISTRATE DIDN'T HAVE A COPY OF THE POLICE REPORT, AND NEITHER DO I. I AM NOT ALLOWED TO LOOK AT A COPY OF THE POLICE REPORT. IN THIS WHOLE FILE THERE IS NO POLICE REPORT AND NEVER WILL BE, BECAUSE IT'S NOT FOR ME. IT'S FOR THE PROSECUTOR AND DEFENSE TO HAVE SO THEY CAN USE IT FOR WHATEVER PURPOSE THEY FIND NECESSARY IN THE COURSE OF THE TRIAL.

BUT THE FACT A WITNESS MAY HAVE SAID SOMETHING TO A POLICEMAN AT THE TIME OF THE INVESTIGATION AND SAID SOMETHING CONTRARY TO THAT AT TRIAL, IN THE FIRST PLACE, IT DOESN'T PROVE THAT THE WITNESS IS LYING. IT CERTAINLY DOESN'T

PROVE THERE HAS BEEN SUBORDINATION OF PERJURY.

SO AS FAR AS THE 995 MOTION IS CONCERNED, I HAVE TO LOOK AT JUST EXACTLY WHAT HAPPENED BEFORE THE MAGISTRATE. THAT'S WHAT I HAVE DONE.

IS THERE ANYTHING -- ANY COMMENT THAT YOU WANT TO MAKE OR ANYTHING -- AND I ALSO READ EVERY WORD OF YOUR MOTION UNDER 995. SO I HAVE READ THAT, AND I HAVE READ THE TRANSCRIPT.

IS THERE ANYTHING YOU WANT TO ADD TO WHAT YOU FILED?

THE DEFENDANT: JUST IN REGARDS TO MR. FAGAN PUTTING THE WITNESSES ON AND HAVING THEM TESTIFYING TO THINGS THAT THEY HAD STATED PREVIOUSLY WERE DIFFERENT. ISN'T IT THE COURT'S DUTY TO DISREGARD THE INCOMPETENT EVIDENCE

ENTERED AT THE PRELIMINARY AND BASE THEIR RULING ON THE EVIDENCE THAT REMAINS?

THE COURT: IF THERE WERE -- IF THE MAGISTRATE STRUCK EVIDENCE OR SUSTAINED OBJECTIONS AND RULED EVIDENCE TO BE INCOMPETENT, AND THEN BASED ITS RULING ON THE EVIDENCE THAT WAS STRICKEN, THAT WOULD BE AN ERROR THAT I COULD REVIEW; BUT THAT DIDN'T HAPPEN.

AS FAR AS I AM CONCERNED, I HAVE TO PUT MYSELF IN THE SHOES OF THE MAGISTRATE WHO HEARD THIS AND SAY, IF I WERE THE MAGISTRATE AND I HEARD EXACTLY THE SAME TESTIMONY, WHAT WOULD -- AND THEN THE PEOPLE RESTED THEIR CASE AND NOW IT CAME TIME FOR ME TO SAY, IS THERE REASON TO BELIEVE THAT A CRIME HAS BEEN COMMITTED, IS THERE REASON TO

BELIEVE THAT SOMEBODY WAS KILLED OTHER THAN BY SUICIDE OR AN ACCIDENTAL DEATH, THAT'S THE FIRST QUESTION.

WELL, THERE IS NO QUESTION THIS PERSON WAS KILLED BY MULTIPLE GUNSHOTS THAT WERE NOT SELF-INFLICTED. SO THERE IS REASON TO BELIEVE THAT HE WAS INTENTIONALLY KILLED BY HOMICIDE.

NOW, IS THERE REASON TO BELIEVE, ANY REASON TO BELIEVE THAT YOU MIGHT JUST POSSIBLY BE GUILTY? THAT'S THE MAGISTRATE'S TEST. IT'S NOT GUILTY BEYOND A REASONABLE DOUBT. THAT'S FOR THE JURY TO DETERMINE. BUT JUST IS THERE A REASONABLE SUSPICION THAT THE MAN THAT'S BEFORE ME MAY BE GUILTY?

BECAUSE, REMEMBER, THIS MAGISTRATE IS A MUNICIPAL COURT COMMISSIONER. HE DOESN'T TRY FELONIES.

THIS A SCREENING PROCESS. HE IS NOT EVEN -  
- ALTHOUGH HE IS SITTING AS A JUDICIAL OFFICER, HIS JOB IS DESCRIBED AS THAT OF A MAGISTRATE. IT'S A SCREENING PROCESS.

SO IF A CASE -- IF THERE IS NO EVIDENCE TO SUPPORT THE CHARGE, AND THE MAGISTRATE BINDS SOMEBODY TO ANSWER, AND A 995 MOTION IS BROUGHT BEFORE ME AND I SAY, NO, I AM NOT GOING TO WASTE THE COUNTY'S TIME AND MONEY TRYING A CASE WHERE THERE IS NO EVIDENCE OF GUILT, I THROW IT OUT. THAT'S WHAT A 995 MOTION IS ABOUT.

WHEN ATTORNEYS FILE A 995 MOTION, THEY DIRECT MY ATTENTION TO LINE AND PAGE OF THE TRANSCRIPT AND SAY, HERE, THIS WAS WHAT WAS SAID, THIS EVIDENCE DOESN'T SUPPORT THE CHARGE. IF I AGREE, I

SAY, RIGHT, AND THE CASE IS DISMISSED, AND I THROW IT OUT ON 995.

BUT AS LONG AS THERE IS EVIDENCE TO SUPPORT THE CHARGE, I CAN'T REWEIGH THE EVIDENCE. I DIDN'T SEE THE WITNESSES. I DIDN'T GET TO HEAR THEM. SO I HAVE TO GO BY THE COLD RECORD AND SAY, IS THERE REASON TO BELIEVE THAT YOU COMMITTED, IT; AND THAT'S WHAT I GOT TO RULE ON.

NOW, WITHIN THOSE PARAMETERS, IS THERE ANYTHING ELSE YOU WANT TO ADD TO WHAT YOU FILED?

THE DEFENDANT: NO, YOUR, HONOR.

THE COURT: ALL RIGHT.

FOR THE REASONS THAT I AM TRYING TO EXPLAIN TO YOU -- BECAUSE I REALIZE WHEN YOU DO ALL OF THIS WRITING AND ALL THIS PAPERWORK, YOU ARE SINCERE IN WHAT YOU ARE DOING, AND I WANT TO EXPLAIN TO

YOU WHY I AM DOING WHAT I AM DOING. BUT THE MOTION IS DENIED.

TURNING TO THE MOTION TO DISQUALIFY THE PROSECUTOR, IN THE FIRST PLACE, THERE IS NO REPRESENTATIVE HERE FOR THE ATTORNEY GENERAL. THIS IS NOT A CASE THAT THE ATTORNEY GENERAL HAS TO TAKE OVER. THERE ARE CASES WHERE THE SECTION THAT YOU RELY ON, 1424 OF THE PENAL CODE, IS A SITUATION WHERE THERE IS A CONFLICT OF INTEREST.

FOR EXAMPLE, THERE HAVE BEEN A COUPLE CASES IN RECENT YEARS WHERE A DEPUTY DISTRICT ATTORNEY HAS GOTTEN INTO TROUBLE AND WAS PROSECUTED; AND BECAUSE OF THE FACT THAT HE WORKED AS A DEPUTY DISTRICT ATTORNEY, THE ENTIRE OFFICE RECUSED ITSELF FROM THE CASE AND



SAID, WE CAN'T HANDLE THIS PROSECUTION BECAUSE THERE IS A CONFLICT OF INTEREST.

EVEN THOUGH THERE MIGHT NOT BE ANY REAL CONFLICT, EVEN THOUGH THIS PARTICULAR DEPUTY D.A. MIGHT BE ABLE TO COMPLETELY IMPARTIALLY PROSECUTE THE CASE, THERE WOULD ALWAYS BE THAT PERCEPTION. SO THE WHOLE OFFICE GETS OUT, AND THE ATTORNEY GENERAL TAKES OVER AND THEY PROSECUTE THE CASE.

OF IF THERE IS A CONFLICT EVEN WITH INVOLVEMENT WITH A DEPUTY DISTRICT ATTORNEY, IF A DEPUTY D.A. IS GOING TO BE A PRINCIPAL WITNESS IN THIS CASE, THEN THE OFFICE WILL STEP OUT ON THE BASIS THAT THERE IS TOO MUCH DANGER THAT THERE COULD BE -- THAT IT COULD BE PERCEIVED THERE WAS A CONFLICT OF INTEREST.

BUT THAT'S THE ONLY WAY THAT YOU RECUSE THE PROSECUTOR. A DEFENDANT CAN'T GET RID OF A PROSECUTOR BECAUSE HE DOESN'T LIKE HIM.

YOU CITE THE FACT THAT IT'S AGAINST THE LAW FOR SOMEBODY TO SUBORN PERJURY. WELL, ALL ATTORNEYS KNOW THAT. WE KNOW IT'S AGAINST THE LAW FOR SOMEBODY TO DELIBERATELY ASK A QUESTION TO ELICIT AN UNTRUTHFUL ANSWER. BUT, AGAIN, I HAVE NO EVIDENCE OF THAT.

THE FACT THAT A WITNESS MAY HAVE SAID ONE THING TO A POLICE OFFICER AT THE TIME OF AN INITIAL REPORT AND CHANGED THAT STORY AND SAID SOMETHING AFTERWARD, OR THE FACT A WITNESS MAY HAVE SAID, I DIDN'T TELL THE TRUTH TO THE POLICE OFFICER FOR REASONS OF MY OWN -- LIKE IN THIS CASE, THE GUN SITUATION, I

DIDN'T WANT THEM SEIZING MY WHOLE GUN COLLECTION AND THEN TO HAVE TO FIGHT TO GET MY GUNS BACK, SO I LIED TO THEM INITIALLY ABOUT GUNS; BUT NOW HE STRAIGHTENS IT OUT AT THE PRELIMINARY HEARING. NOW, WHEN IT'S BOUGHT OUT, IT DOESN'T MEAN THAT MR. FAGAN PARTICIPATED IN THE ORIGINAL FALSEHOOD OR THAT THAT PERSON IS NOW PERJURING HIMSELF.

YOU HAVE TO REMEMBER THE STATEMENT MADE TO THE COP WASN'T UNDER OATH. THE ONLY TIME HE IS UNDER OATH IS WHEN HE TAKES THE WITNESS STAND AND SWEARS TO TELL THE TRUTH. SO THE PREVIOUS INCONSISTENT STATEMENTS THAT WERE MADE BY WITNESSES DO NOT AUTOMATICALLY PROVE PERJURY, BECAUSE THEY WEREN'T STATEMENTS THAT WERE

MADE UNDER OATH AT THE TIME THAT HE TALKED TO A POLICE OFFICER.

BUT, AGAIN, I AM TRYING TO EXPLAIN TO YOU THAT THE MOTION TO DISQUALIFY THE PROSECUTOR IS NOT WELL TAKEN BECAUSE THERE IS -- IN ALL YOUR PAPERS THERE IS NO CONFLICT AS FAR AS HE IS CONCERNED. MR. FAGAN PROSECUTES CASES AND HAS PROSECUTED HUNDREDS AND HUNDREDS OF CASES.

SOME PEOPLE HE MAY FEEL A LITTLE BIT SORRY FOR, MAYBE HE FEELS SOME KINDLY FEELING TO; OTHER PEOPLE HE MAY DISLIKE INTENTIONALLY. IT DOESN'T MAKE ANY DIFFERENCE. HE IS A PROFESSIONAL, AND HE HAS A JOB TO DO. WHETHER OR NOT YOU LIKE MR. FAGAN OR WHETHER HE LIKES YOU IS COMPLETELY IMMATERIAL. HE IS A

PROSECUTOR, AND IN THIS COURT HE WILL PERFORM AS A PROFESSIONAL.

AND IF THERE WERE ANY PERSONALITY INJECTED INTO IT, THAT'S PART OF MY JOB TO CONTROL THAT AND SEE THAT IT DOESN'T HAPPEN; AND I CAN ASSURE YOU THAT WON'T HAPPEN. MR. FAGAN IS A VERY EXPERIENCED PROSECUTOR AND KNOWS THE RULE AND PLAYS BY THE RULES.

BUT AS FAR AS YOUR MOTION TO DISQUALIFY, YOU DON'T HAVE ANY GROUNDS FOR IT.

THE DEFENDANT: YOUR HONOR, HIS STAR WITNESS, SO TO SPEAK CHANGED HIS STORY THREE TIMES ON THE WITNESS STAND.

IS THAT PERJURY OR IS THAT NOT PERJURY?

THE COURT: MR. FAGAN DIDN'T TESTIFY.

THE DEFENDANT: IT'S LINED OUT IN THE MOTION.

THE COURT: MR. FAGAN DIDN'T TESTIFY. SO THE FACT THE MAN CHANGES HIS STORY, DOES THAT MEAN THAT AS SOON AS THAT HAPPENS THAT THE PROSECUTOR HAS TO RUN FOR COVER AND SAY, I CAN'T HANDLE THIS CASE ANYMORE BECAUSE MY WITNESS CHANGED HIS STORY?

IF WE DID THAT, THERE WOULD BE CASE AFTER CASE THAT COULDN'T GO FORWARD BECAUSE SOMEBODY CHANGED THEIR STORY.

NOW, YOU CAN BRING THAT OUT IN THE TRIAL AND SAY -- GO TO THE CREDIBILITY. BECAUSE THE JURY WOULD BE INSTRUCTED THAT ONE OF THE THINGS -- ONE OF THE CRITERIA THEY GET TO USE IN JUDGING THE CREDIBILITY OF THE TESTIMONY OF WITNESSES



IS ANY PRIOR INCONSISTENT STATEMENTS THAT THESE WITNESSES MAKE.

ALSO I WILL INSTRUCT THE JURY IN THE COURSE OF THIS TRIAL THAT IF YOU FIND THAT A WITNESS HAS MADE AN UNTRUTHFUL STATEMENT ON A PRIOR OCCASION, THAT THAT'S A FACTOR THAT YOU CAN TAKE INTO CONSIDERATION IN WEIGHING HIS CREDIBILITY.

AND, FURTHER, THE JURY IS INSTRUCTED THAT IF YOU FIND A WITNESS HERE IN THIS COURTROOM TO BE UNTRUTHFUL, YOU MAY REJECT THE WHOLE TESTIMONY OF SUCH A WITNESS, UNLESS YOU BELIEVE IN OTHER PARTICULARS THE WITNESS HAS SWORN TO THE TRUTH. THE JURY IS TOLD THAT.

IF THEY DECIDE A QUESTION OF FACT -  
- AND THE JURY IS THE EXCLUSIVE JUDGE OF  
THE FACTS AND CREDIBILITY OF THE

WITNESSES. BUT IF THE JURORS GO BACK THERE AND THEY AGREE WITNESS "A" LIED ON THE STAND, THEN THEY CAN SAY, LET'S THROW OUT ALL OF HIS TESTIMONY, LET'S NOT CONSIDER ANYTHING HE HAD TO SAY. THAT'S WHAT THE LAW IS. THEY MAY DO THAT. THEY DON'T HAVE TO, BUT THEY MAY, UNLESS THEY FIND IN OTHER PARTICULARS HE TOLD THE TRUTH.

YOU SEE, AS A PRACTICAL MATTER, THEY SAY, WELL, HE TOLD THE TRUTH ABOUT HIS NAME, TOLD THE TRUTH ABOUT WHERE HE LIVED, SO WE DON'T HAVE TO THROW THAT OUT, OR WHERE HE WAS ON A PARTICULAR OCCASION. BUT AS FAR AS HIS CRITICAL TESTIMONY IS CONCERNED, THEY CAN THROW IT ALL OUT.



BUT THAT'S SOMETHING YOU CAN ARGUE TO THE JURY, BUT IT DOESN'T DISQUALIFY THE PROSECUTOR.

SOMETIMES WITNESSES WILL CHANGE THEIR TESTIMONY COMPLETELY. SOMETIMES WE HAVE A SITUATION WHERE WITNESSES REFUSE TO ANSWER QUESTIONS, OR SAY, EVERYTHING I SAID AT THE PRELIMINARY HEARING WAS A LIE, AND I DON'T WANT TO TESTIFY HERE, I REPUDIATE EVERYTHING I SAID. THE CASE DOESN'T HAVE TO BE DISMISSED.

THERE ARE CASES THAT SAY UNDER THOSE CIRCUMSTANCES, THE JURY CAN HAVE THE PRELIMINARY HEARING TESTIMONY READ, AND THEY DECIDE WHETHER IT WAS TRUTHFUL OR NOT. THAT'S A SPECIAL SITUATION THAT'S CALLED GREENING A WITNESS, BECAUSE THAT CASE WAS PEOPLE

VERSUS GREEN THAT SAID THAT YOU COULD DO THAT. THAT HAPPENS OCCASIONALLY. IT'S HAPPENED IN THIS VERY COURT.

THESE ARE ALL THINGS THAT COME UP IN THE COURSE OF THE TRIAL. WHEN WE GO TO TRIAL ON THIS CASE, I WILL -- AS I TOLD YOU BEFORE, I AM NOT GOING TO BE YOUR ATTORNEY, BUT I WILL DO EVERYTHING IN MY POWER TO SEE TO IT THAT YOU HAVE A FAIR TRIAL AND THAT THE TRIAL IS CONDUCTED WITHIN THE RULES AND THAT EVERY RIGHT OF YOURS IS PROTECTED.

BUT THE MOTION TO DISQUALIFY THE PROSECUTOR, AS I SAY, IS NOT WELL TAKEN AND IT IS DENIED. HOWEVER, AGAIN, YOU MADE YOUR RECORD. YOUR MOTIONS ARE HERE, THEY ARE PART OF THE FILE, AND EVERYTHING THAT I HAVE SAID IS ALSO PART OF THE RECORD SUBJECT TO APPELLATE

REVIEW. SO IF YOU FEEL THAT I HAVE ERRED IN ANYTHING THAT I HAVE SAID, WHY, YOU MADE YOUR RECORD AND IT CAN BE TAKEN UP.

THE DEFENDANT: YES, I REALIZE THAT. I JUST WANT TO GET A FAIR AND IMPARTIAL TRIAL.

THE COURT: THAT'S WHAT WE ARE GOING TO DO.

THE DEFENDANT: I HAVE NOTHING PERSONALLY AGAINST MR. FAGAN OR THIS COURT OR ANYONE ELSE INVOLVED. I HAVE BEEN LOCKED UP A YEAR AND A HALF FOR THIS, AND IT'S GETTING REAL OLD.

THE COURT: BUT IT'S NOT GOING TO GET MUCH OLDER. WE ARE GOING TO FIX THE TRIAL DATE NOW ON THE 17TH OF AUGUST. WE ARE ACTUALLY GOING TO START THE TRIAL ON THAT DAY, THE GOOD LORD

WILLING. THAT WILL BE THE TRIAL DATE. YOU WILL BE ORDERED BACK TO COURT ON THAT DAY READY TO PROCEED FOR TRIAL. WE WILL SEE TO IT THAT WE ARE AVAILABLE FOR TRIAL ON THAT DATE.

THE DEFENDANT: YES, YOUR HONOR.

I HAVE ONE OTHER REQUEST OF THE COURT. I WOULD LIKE TO HAVE THE ASSISTANCE OF COUNSEL AT THE TRIAL. I AM NOT REAL GOOD AT PUBLIC SPEAKING. I AM DOING OKAY AS FAR AS THE LAW WORK AND STUFF. OBVIOUSLY, I AM NOT A LAWYER, BUT I NEED SOMEBODY TO HELP ME PRESENT THE CASE.

THE COURT: YOU SEE, I CAN'T DO THIS, MR. ROBBINS. WHAT YOU FILED TODAY IS A GOOD EXAMPLE. YOU WANT TO FILE THESE MOTIONS. ANY LAWYER WOULD GLANCE AT THIS STUFF AND SAY, FROM A LAWYER'S STANDPOINT -- I AM

NOT SAYING THIS TO PUT YOU DOWN -- BUT FROM A LAWYER'S STANDPOINT, THIS IS GARBAGE, I WON'T FILE IT, I WON'T PUT MY NAME ON IT.

YOU SAY, WELL YOU DON'T HAVE TO, I AM IN PRO PER.

AND HE WOULD SAY, HOW CAN I BE YOUR ADVISOR IF YOU WON'T LISTEN TO MY ADVICE?

IF YOU WANT TO CALL THE SHOTS AND RUN THE TRIAL, I AM NOT GOING TO ASK AN EXPERIENCED ATTORNEY WHO IS TRAINED IN LAW SCHOOL AND WHO IS A CRIMINAL LAWYER TO SIT THERE AND PLAY SECOND FIDDLE AND HAVE YOU CALL THE SHOTS AND TO HAVE HIM NOT BE ABLE TO RUN THE TRIAL. I WOULDN'T DO IT AS AN ATTORNEY. I WOULDN'T ACCEPT THAT POSITION. THERE IS NO ATTORNEY I WOULD PUT IN THAT POSITION.

THE DEFENDANT: I WOULDN'T INSULT THE ATTORNEY'S INTELLIGENCE. I DO NEED SOME HELP PRESENTING THE EVIDENCE AT THE TRIAL.

I KNOW THE COURT IS AWARE OF THE RECENT CASE LAWS IN REFERENCE TO APPOINTING CO-COUNSEL AND ADVISORY COUNSEL, SO I DON'T NEED TO QUOTE THAT TO THE COURT; BUT I AM ASKING FOR THE ASSISTANCE OF COUNSEL TO HELP ME PRESENT MY DEFENSE.

THE COURT: YOU SEE, WHAT HAPPENED IN THIS CASE -- I KNOW IN SOME OF YOUR MOVING PAPERS YOU HAVE SAID THAT YOU FEEL THAT MR. SEIFER WAS INCOMPETENT AND DIDN'T PROPERLY REPRESENT YOU; BUT MR. SEIFER IS ONE OF THE MOST EXPERIENCED ATTORNEYS. AND HE HAPPENS TO WORK FOR THE PUBLIC DEFENDER'S OFFICE; BUT HE WOULD BE A



CAPABLE, EXPERIENCED ATTORNEY IN THE PRIVATE SECTOR, AS WELL. HE WAS YOUR ATTORNEY.

ALL THAT I CAN DO FOR SOMEBODY WHO DOESN'T HAVE MONEY TO HIRE AN ATTORNEY IS TO APPOINT THE PUBLIC DEFENDER. THAT'S THE ONLY OPTION THAT I HAVE, UNLESS THERE IS A CONFLICT.

THE DEFENDANT: I BELIEVE THERE IS A CONFLICT. MY FAMILY HAS FILED A LAWSUIT AGAINST THE PUBLIC DEFENDER'S OFFICE AND THE COUNTY IN REFERENCE TO THIS.

THE COURT: AT THE TIME THE PUBLIC DEFENDER'S OFFICE WAS RELIEVED, THERE WAS NOT A CONFLICT; AND AT THAT TIME THERE WAS NO MARSDEN MOTION FILED -- THERE WAS A MARSDEN MOTION FILED, BUT AT THAT TIME THERE WAS NO CONFLICT. AND

YOU ELECTED TO GO PRO PER. THIS WAS YOUR CHOICE, AND YOU HAVE BEEN PRO PER.

YOU FILED EVERY POSSIBLE MOTION THAT YOU COULD FILE TO DELAY THIS MATTER AND PUT IT OFF AND TO KEEP JUDGES FROM HEARING YOUR MATTER AND KEEP THE MATTER FROM BEING BROUGHT TO TRIAL. NOW WE HAVE COME DOWN TO THE MOMENT OF TRUTH. YOU HAVE DECIDED TO BE YOUR OWN ATTORNEY, AND THIS IS YOUR BED THAT YOU HAVE MADE. I AM NOT GOING TO APPOINT ADVISORY COUNSEL.

THE MATTER WILL PROCEED TO TRIAL ON THE 17TH. YOU ARE THE ATTORNEY. AS I SAID, I WILL DO EVERYTHING I CAN TO INSURE THAT YOU HAVE A FAIR TRIAL, BUT I AM NOT GOING TO APPOINT ADVISORY COUNSEL. IT'S A MATTER OF DISCRETION WITH ME. I EXERCISE MY DISCRETION. THE ANSWER IS NO.



THE DEFENDANT: YES, SIR.

(PROCEEDING CONCLUDED.)

LEE ROBBINS  
E-69926 1-A2 07  
P.O. Box W  
Represa, CA 95671

COURT OF APPEAL STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION 4

Court of Appeal Second Dist.  
**FILED**

June 24 1991

ROBERT N. WILSON Clerk  
R. TAYLOR

Deputy Clerk

RE: PEOPLE OF THE STATE OF CALIFORNIA

-vs-

ROBBINS, LEE  
2 Criminal B054733  
Los Angeles No. A481636

TO THE HONORABLE JUDGE WOODS;

On 4-26-91 I sent a letter to this  
court requesting new counsel.  
TO DATE I HAVE RECEIVED NO REPLY.

On 4-26-91 I sent a copy of the above mentioned  
letter to the;  
California Appellate Project  
3580 Wilshire Blvd.  
Suite 1755  
Los Angeles, CA

TO DATE I HAVE RECEIVED NO REPLY.

On 5-21-91 I sent copies of the above letters to my parents with the instructions to send certified copies to the court and call as to the status of my request for new counsel. To date that letter has not been received by my parents.

On 4-16-91 at 10 AM I was removed from my cell for a cell search, the corrections officer who entered my cell and searched, just by chance happens to be officer Renaldo, a Los Angeles County Sheriffs Deputy out of the Lakewood, CA Sheriffs station, who also just happens to be one of the deputies involved in my case! I feel the odds of this being a chance occurrence to be too great to not merit investigation by this court.

On 5-5-91 I purchased a copy of the trial transcript from my appointed attorney general (Date Received)  
Mr. David H. Goodwin  
P.O. Box 95579

I compared the cross-exam portion to the pages of printed questions I asked at trial (I was pro-per) I was not overly surprised to see where many pertinent questions and answers were deleted. Items as the homicide sgt. Falsifying the police reports, for example where he says "the extradition proceedings were completed and the authorization by the governor of Arkansas was given to return the suspect to the Los Angeles area." No extradition hearing was ever held in Arkansas and Sgt. Cox's request for a governors warrant was DENIED! There are many such items as this that I have found to be deleted from the trial record, if the court wishes I can provide a fair summation from my trial notes of the portions of the record that has been deleted.

It is my understanding that copies of all motions made that were denied in whole or part, and are to be part of

the normal record on appeal, these have also been deleted from the record I have received.

I would respectfully request this court to order the following papers, records and transcripts be prepared to augment, expand and complete the record for appeal.

A copy of the "murder book" retained by the D.A., containing police reports, coroners reports, ballistic reports, etc.

A true and correct copy of the trial transcript be prepared from the court reporters records (if they still exist.)

Los Cerritos Municipal Court:  
copies of two Marsden Hearings held between 9-15-89 and 12-5-89

Norwalk Superior Court:

12-20-89 MARS DEN HEARING - DENIED

3-1-90 1368 P.C. HEARING, COPIES OF DOCTORS REPORTS

3-7-90 MARS DEN HEARING - DENIED

4-16-90 170.1 MOTION, D.A. ORDERED TO COMPLY WITH DISCOVERY. REQUEST FOR COUNSEL DENIED.

5-2 90 REQUEST FOR COUNSEL DENIED. WRIT OF MANDATE DENIED.

6-6-90 HITCH/TROMBETTA MOTION DENIED.

7-13-90 REFUSED TO HEAR 995 MOTION.  
 REFUSED TO RE-HEAR REQUEST FOR  
 COUNSEL.  
 REFUSED TO RE-HEAR  
 HITCH/TROMBETTA MOTION.  
 REFUSED TO ACCEPT WRIT.  
 DENIED MOTION TO CONTINUE.  
 DENIED REQUEST FOR ADDITIONAL  
 INVESTIGATOR FUNDS.  
 1538.5 MOTION RULED MOOT.

7-16-90 170.1 MOTION

8-2-90 170.1 MOTION DENIED BY JUDICIAL  
 COUNCIL, JUDGE ARMSTRONG  
 PERJURED HIMSELF WHEN HE HOLD  
 JUDICIAL COUNCIL NO. 995 REQUEST  
 WAS MADE ON 13-90

8-9-90 995 MOTION DENIED.  
 1424 MOTION DENIED.

At this hearing I requested to be represented at trial by  
 counsel, I said I have done all that I possibly can, I am not  
 qualified to conduct a trial and need counsel, Judge  
 Armstrong stated that I had made my bed and could now  
 sleep in it, he was not going to appoint counsel!

8-20-90 THE PEOPLE'S OPENING STATEMENT

To briefly re-state my reasons for requesting new counsel:

I have not heard from Mr. Goodwin since 4-18-91.

He has failed to respond to the last two letters I sent him,  
 and in the letters he did bother to respond to his answers

indicated that he did not read and/or understand the  
 questions I posed or the materials I sent him.

Mr. Goodwin is not QUALIFIED AND/OR willing to  
 handle this appeal. His complete failure to communicate  
 with me, his inability to reach logical conclusions from the  
 materials the court and myself have sent him, his inability  
 to apply statutory or case law to the issues I have raised  
 leaves me with no other option but to request new counsel  
 be appointed so I can adequately prepare and present my  
 case for a fair and just hearing before this honorable court.

I have been in contact with a local attorney here who is  
 qualified and able to handle the extensive research and  
 preparation needed to present this case before you.

I respectfully request the court to appoint as new counsel  
 on appeal:

Mr. Mark Christensen  
 Attorney at Law  
 P.O. Box 163269  
 Sacramento, CA 92663

Respectfully submitted

Lee Robbins

I solemnly affirm the foregoing to be true and correct.

Lee Robbins  
 Appellant

DATED: June 15, 1991  
 At Represa, CA

IN THE COURT OF APPEAL OF THE STATE  
OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

Court of Appeal - Second Dist.

**FILED**

OCT 28 1991

ROBERT N. WILSON Clerk

F.G. STAPLETON, JR.

Deputy Clerk

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THE PEOPLE,	)	No. B054733
	)	
Plaintiff and	)	(Super.Ct.No. A481636)
Respondent,	)	
	)	
v.	)	ORDER
	)	
LEE ROBBINS,	)	
	)	
Defendant and	)	
Appellant.	)	
	)	

THE COURT:\*

The letter to the clerk dated September 28, 1991, and filed October 2, 1991, is deemed a motion to augment the record. No good cause having been shown, the motion is denied. An appeal must be decided upon the record of the proceedings which occurred in the trial



court. (People v. Wein (1958) 50 Cal.2d 383, 411.) On May 3, 1991, this court ordered the record augmented upon the request of counsel, whose duty it is to see that the record is properly augmented for review.

IN THE  
COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION: 4

Court of Appeal - Second Dist.

**FILED**

OCT 28 1991

ROBERT N. WILSON Clerk

F.G. STAPLETON, JR.

Deputy Clerk

People of the State of California

vs.

Robbins, Lee

2 Criminal B054733

Los Angeles No. A481636

THE COURT:

Counsel appointed to represent appellant on appeal has filed appellant's opening brief. Counsel's inability to find any arguable issues may readily be inferred from the failure to raise any. (People v. Wende (1979) 25 Cal. 3d 436, 442.) Such opening brief having been read and considered by this court,

IT IS ORDERED that unless it has already been done, counsel shall send the record on this appeal and a copy of appellant's opening brief to appellant immediately.

Within 30 days from the date of this order, appellant my submit by brief or letter any grounds of appeal, contentions, or arguments which appellant wishes this court consider.

**WOODS, P.J.**  
Presiding Justice

APR 22 1999

CLERK

No. 98-1037

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1998

GEORGE SMITH, Warden,

*Petitioner,*

vs.

LEE ROBBINS,

*Respondent.*

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**BRIEF FOR PETITIONER**

BILL LOCKYER

Attorney General

of the State of California

DAVID P. DRULINER

Chief Assistant Attorney General

CAROL WENDELIN POLLACK

Senior Assistant Attorney General

DONALD E. DE NICOLA

Deputy Attorney General

CAROL FREDERICK JORSTAD

Deputy Attorney General

*Counsel of Record*

300 South Spring Street

Los Angeles, California 90013

(213) 897-2277

*Counsel for Petitioner*

PETITION FOR CERTIORARI FILED DECEMBER 17, 1998  
CERTIORARI GRANTED MARCH 8, 1999

## QUESTIONS PRESENTED

In *Anders v. California*, 386 U.S. 738 (1967), this Court held that an indigent criminal appellant could not be denied representation on appeal based on appointed counsel's bare assertion that there was no merit to the appeal. In California, approximately 20 percent of criminal appeals result in the filing of no-merit briefs on behalf of indigent appellants.

1. Did the Ninth Circuit err in finding that California's no-merit brief procedure -- in which appellate counsel who has found no nonfrivolous issues remains available to brief any issues the appellate court might identify -- violated the Sixth and Fourteenth Amendment *Anders* right to due process, equal protection and effective assistance of counsel on appeal?

2. Did the Ninth Circuit err when it ruled that the asserted *Anders* violation required a new appeal, without testing the claimed Sixth Amendment error under *Strickland v. Washington*, 466 U.S. 668 (1984)?

3. Did the Ninth Circuit violate the rule announced in *Teague v. Lane*, 489 U.S. 288 (1989), which prohibits the retroactive application of a new rule on collateral review, when it invalidated California's well-settled, good-faith interpretation of federal law?



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## IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

No. 98-1037

---

 GEORGE SMITH, Warden, *Petitioner*,

v.

---

 LEE ROBBINS, *Respondent*.
OPINIONS BELOW

The decisions previously filed in this case are reproduced in the joint appendix (J.A.) filed under separate cover. The amended opinion of the United States Court of Appeals appears at J.A. 75-94 and is reported at 152 F.3d 1062 (CA9 1998). The original opinion appears at J.A. 57-74 and is reported at 125 F.3d 831 (CA9 1997).

The unreported opinion of the United States District Court appears at J.A. 44-53. The California Supreme Court's unreported denial orders appear at J.A. 40-42. The California Court of Appeal's unreported affirmance of Robbins's conviction appears at J.A. 38-39.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued an amended opinion on August 13, 1998, and denied the Warden's petition for rehearing on September 24, 1998. The Warden's petition for writ of certiorari was filed on December 17, 1998, within 90 days

of the denial order, and granted on March 8, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

### CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides, in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides, in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

### STATUTORY PROVISIONS

Section 2254 of Title 28 of the United States Code provides in pertinent part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

### STATEMENT OF THE CASE

On December 31, 1988, respondent Lee Robbins shot and killed his former roommate in California. When he became the focus of the police investigation, Robbins fled

in a stolen truck. He was later arrested in Arkansas and the truck was recovered in Arizona. J.A. 28, 32, 290.

Against all advice, Robbins waived his Sixth Amendment right to counsel and represented himself at trial. J.A. 198-203, 217-27, 230-35. Admittedly unschooled in the law, he committed many blunders, most notably by failing to make trial objections that would have preserved issues for post-trial review. A Los Angeles jury found Robbins guilty of second degree murder with personal firearm use and grand theft of an automobile. J.A. 38. On September 5, 1990, he was sentenced to state prison for 17 years to life. J.A. 28, 39.

Faced with the record Robbins had failed to make in the trial court, his appointed appellate attorney was unable to find any nonfrivolous issues to raise on direct review. J.A. 35. As a consequence, counsel filed a no-merit brief in compliance with *People v. Wende*, 25 Cal. 3d 436, 158 Cal. Rptr. 839 (Cal. 1979), California's interpretation of this Court's decision in *Anders v. California*, 386 U.S. 738 (1967). In that brief, counsel set forth the procedural history and a statement of the facts, with citations to the record. J.A. 26-37. Robbins's attorney asked the State Court of Appeal to make an independent review of the record for arguable issues, as required by *Wende*. J.A. 35. In an attached declaration, appellate counsel averred that he had spoken to the attorney who had represented Robbins until Robbins waived counsel and asserted his right to represent himself. He had also written to Robbins, informing the latter of his right to seek counsel's removal and to file a supplemental brief in propria persona. Counsel also declared that he remained available to brief any issues the state appellate court might identify. J.A. 36. Robbins then personally filed a supplemental brief, claiming insufficient evidence to support the conviction and denial of due process based on the prosecutor's suppression of exculpatory evidence. J.A. 39.

On December 12, 1991, after independently examining the record, the appellate court found that counsel had "fully complied with his responsibilities," that the claims in Robbins's supplemental propria persona brief "found no support in the record," and that no arguable issues existed. It affirmed the judgment. J.A. 39, citing *Wende*, 25 Cal. 3d at 441.

Robbins's petition for review (No. S02883) and two petitions for writs of habeas corpus (Nos. S033312 and S036062) were denied by the California Supreme Court. J.A. 40-42.

On February 24, 1994, Robbins filed a federal petition for writ of habeas corpus, alleging ineffective assistance of appellate counsel for filing a no-merit brief when there were nonfrivolous issues to be raised. J.A. 1. In response to the district court's order, the Warden filed a return, and Robbins filed a traverse. J.A. 2, 4, 5.

On September 8, 1994, the court appointed counsel to represent Robbins and ordered the parties to file supplemental briefing. J.A. 5. On October 24, 1995, the federal district court conditionally granted Robbins's federal habeas corpus petition, finding two arguable issues and ineffective performance by state appellate counsel on grounds of non-compliance with *Anders*. J.A. 10, 45-47, 53. The court ordered Robbins discharged from custody unless the California Court of Appeal accepted renewed jurisdiction over Robbins's direct appeal within 30 days. J.A. 10, 53. Both the Warden and Robbins filed notices of appeal. J.A. 11, 13.

In a published decision filed September 23, 1997, the Ninth Circuit affirmed the district court, finding a "very low threshold" for arguments appellate counsel is obliged to make under *Anders*. The Ninth Circuit held that state appellate counsel, whose brief complied with California's *Wende* procedure, had not met the requirements of *Anders*, because he failed to bring to the state court's attention two "arguably non-frivolous" issues: (1) Robbins's

right to advisory counsel and/or to withdraw his waiver of primary counsel; and (2) the adequacy of the law library. *Robbins v. Smith*, 125 F.3d 831; J.A. 67-68. The Warden sought rehearing, urging *inter alia* that the panel's decision had not merely lowered the threshold for arguments counsel must brief under *Anders*, but had effectively removed that threshold by forcing state appellate counsel to brief issues they believed to be clearly frivolous, merely to avoid being presumed incompetent. J.A. 22; P.R. 5.<sup>1</sup> The Warden also contended that the panel's novel requirement that all "arguably nonfrivolous" issues be raised on appeal violated the "new-rule" proscription of this Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989). P.R. 5.

Nearly a year later, on August 13, 1998, the Ninth Circuit issued an amended opinion. J.A. 75-94. The court responded to the Warden's arguments by dropping its formulation that all "arguably nonfrivolous" issues must be raised on appeal. Instead, the court held that counsel was required to raise all "arguable" issues. J.A. 87-88. The court found the same two arguable issues it had found before. J.A. 89. The court also found that state appellate counsel had failed to bring to the court's attention "anything in the record that might arguably support the appeal." J.A. 88; *Robbins v. Smith*, 152 F.3d 1062. It affirmed the district court's decision invalidating California's no-merit brief procedure but remanded to permit the lower court to consider whether the alleged constitutional trial errors warranted reversal of the underlying conviction, rather than merely a new appeal. J.A. 94.

When the Ninth Circuit denied the Warden's petition for rehearing and rejected the suggestion for rehearing en banc, the Warden filed a timely petition for writ of

---

1. "P.R." refers to the petition for rehearing filed in the Ninth Circuit.



certiorari. J.A. 25. This Court granted certiorari on March 8, 1999.

## **SUMMARY OF ARGUMENT**

Robbins contended below that he was denied effective assistance of state appellate counsel by virtue of counsel's filing a no-merit brief, even though the brief complied with the California Supreme Court's earlier interpretation of this Court's decision in *Anders v. California*. The Ninth Circuit panel agreed, effectively demolishing California's decades-old *Wende* brief procedure in the process. The panel's decision was fundamentally wrong for three independent reasons.

### **A. The *Wende* Procedure Meets the Requirements of the Sixth and Fourteenth Amendments**

First, California's procedure meets the essential goals of *Anders* by guaranteeing indigent criminal appellants the right to counsel, equal protection and due process. The state supreme court that decided *Wende* in 1979 was just as sensitive and committed to vindicating the rights of criminal defendants -- and just as capable of understanding and applying the constitutional principles announced in *Anders* -- as the Ninth Circuit panel. In *Wende*, the California Supreme Court consciously acted to expand the *Anders* guarantees so that indigent appellants would receive more extensive and effective representation in the state system than the federal Constitution required. To accomplish this end, the court permitted counsel to file a brief protecting the client's rights to a vigorous advocate by (1) allowing counsel to file a brief with detailed citations to the record, without requiring that counsel argue against his client by listing the issues he had rejected, (2) specifying that counsel would remain available during the pendency of the direct appeal, and (3) mandating the state court of appeal to conduct an independent search of the record of arguable issues.



In the years that followed, California established the appellate "projects," an elaborate mechanism designed to ensure that indigent criminal appellants receive competent and vigorous representation. Under that system, counsel are assigned work on the basis of their level of skill, and their work is overseen, assisted and reviewed as necessary by the expert lawyers who serve as appellate project supervisors. The procedure requires that a supervisor perform an intake review of all incoming cases to evaluate them for difficulty, identify possible issues and assign each case to appropriately skilled counsel for handling. When the panel attorney cannot find any nonfrivolous issues to assert and recommends the filing of a no-merit brief, the supervising staff attorney reviews the record and must concur before a no-merit brief is filed.

California's process satisfies equal protection concerns by giving an indigent appellant with a no-merit appeal a minimum of three independent reviews -- those of his panel attorney, the appellate project staff attorney, and the court. In contrast, an appellant whose retained counsel files a merits brief ordinarily has only one independent review -- his attorney's.

*Wende* meets the goal of providing due process, because the procedure gives indigent appellants at least two advocacy reviews of the record before a no-merit brief is filed. In this way, the appellate projects protect the rights of indigent appellants by providing multiple safeguards in the assignment, oversight and review of these cases.

Impoverished appellants with no-merits briefs also receive an independent review by the court. Moreover, counsel's citations to the record in the statement of the case and of the facts in the *Wende* brief assist the court to determine that counsel has done his duty to search the record diligently and thoroughly, and the court's independent review provides judicial insurance that counsel's conclusion was correct. Finally, the state's

procedure delivers all of the constitutional promises of *Anders* without forcing counsel to argue against the client. California's indigents are treated more than equitably by the state's courts.

The Ninth Circuit also erred in reading *Anders v. California* as if this Court had legislated a code of appellate procedure, imposing a rigid and inflexible formula for the handling of no-merit appeals on the states. In so doing, the court lost sight of this Court's admonition that *Anders* was not "an independent constitutional command that all lawyers, in all proceedings, must follow these particular procedures. Rather, *Anders* established a prophylactic framework that is relevant when, and only when, a litigant has a previously established constitutional right to counsel." *Pennsylvania v. Finley*, 481 U.S. 551, 554-55 (1987). In Robbins's case, where there were no nonfrivolous issues for counsel to raise on appeal, the federal reviewing court needlessly invalidated California's decades-old no-merit procedure, which meets and exceeds the *Anders* mandate to safeguard the constitutional rights of indigent appellants.

#### **B. Robbins Was Not Denied Counsel on Appeal**

The Ninth Circuit's second error was to treat Robbins, who was at all times represented by counsel on appeal, as if he had been denied counsel, improperly finding the filing of a no-merit brief to be prejudicial per se, rather than requiring Robbins to show prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). California's procedure is undeniably different from *Gideon v. Wainwright*, 372 U.S. 335 (1963), where this Court held the total denial of counsel per se prejudicial. Under *Wende*, counsel remains on the case, available to brief any issues identified by the court. A California appellant is therefore never denied counsel.

As a matter of policy, a per se reversal rule is justified only when the error is so central and systemic that a reviewing court has no basis for assessing prejudice. In the instant case, even more than when ineffective assistance of trial counsel is alleged, a reviewing court is fully capable of looking at the record on direct appeal to determine whether appellate counsel's performance was deficient and, if so, whether that deficiency prejudiced his client. Here, a *Strickland* analysis dooms Robbins's claim. Appointed counsel could not find arguable issues to assert on direct appeal, because there was no evidentiary basis in the trial record for any. Moreover, even though the two lower federal courts found two issues arguable, no one has ever suggested that they were potentially winning issues.

**C. The Ninth Circuit Impermissibly Applied a New Rule on Collateral Review**

Finally, the panel's decision violates the anti-retroactivity rule of *Teague v. Lane*, 489 U.S. 288. *Teague* required the federal court to survey the legal landscape at the time Robbins's conviction became final to determine whether "[the] state court . . . would have acted objectively unreasonably by not extending the relief later sought in federal court." *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997). In the instant case, it would not have been unreasonable for a judge to believe that California's *Wende* procedure was valid. As explained in the discussion on the merits, *Anders* was never intended to be a rigid formula, and there is ample basis to conclude that *Wende* addresses the core concerns of *Anders*. Arizona and Oregon courts had approved procedures similar to California's. In addition, another member of California's Central District bench denied a *Wende*-based ineffective-appellate-assistance claim at much the same time Robbins's petition was granted. J.A. 54-56.

The circuit court misapplied *Teague*, because there were reasonable interpretations of *Anders* other than that which Robbins now seeks. As this Court has more than once observed, state courts are coequal with the federal courts and are just as qualified to interpret the federal law as an intermediate federal appellate court. *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (conc. op. of Thomas, J.); *Sawyer v. Smith*, 497 U.S. 227, 241 (1990). The Ninth Circuit has completely lost sight of this limitation on the power of the federal courts to second-guess the state courts on debatable points of law.

## ARGUMENT

### I.

#### CALIFORNIA'S NO-MERIT BRIEF PROCEDURE PROVIDES INDIGENT APPELLANTS WITH DUE PROCESS, EQUAL PROTECTION AND EFFECTIVE ASSISTANCE OF COUNSEL

##### A. Introduction

Before this Court's decision in *Anders*, the representation of indigent appellants without arguable issues to present on appeal was informal and unstructured. In *Anders* itself, counsel filed a conclusory no-merit letter, explaining that he would not be filing a brief because he believed his client's appeal to be meritless. *Anders v. California*, 386 U.S. at 742. There, this Court held that an indigent appellant's rights to "substantial equality and fair process" were denied by the California procedure and described a process whereby the states could vindicate those rights. *Id.* at 744.

The California judiciary took immediate measures to implement changes in the state process to bring it into conformity with *Anders*. *People v. Feggans*, 67 Cal. 2d 444, 62 Cal. Rptr. 419 (Cal. 1967). *Feggans* required an indigent's appellate counsel who found no arguable issues to present a statement of facts with citations to the record. Counsel could properly ask to withdraw from the case but could not argue the case against his client. *Id.* at 447. If any issue was found to be reasonably arguable, the court was required to appoint counsel to brief that contention. *Id.* at 448.

Not content with merely meeting the threshold set by *Anders*, the California Supreme Court, under the

leadership of Chief Justice Bird, expanded the rights of indigent state appellants in 1979. *People v. Wende*, 25 Cal. 3d at 436. The *Wende* court devised what has become the standard California no-merit procedure, in which counsel presents a statement of the case and statement of facts with citations to the record, raises no specific issues, and asks the court to make its own independent review of the record in search of arguable issues. *Id.* at 438.

Counsel in *Wende* had submitted a declaration stating that he had advised his client he was filing a no-merit brief, that the client could submit his own brief and have counsel removed, and that counsel would send the client a copy. Counsel did not ask to withdraw. *Id.* The Court of Appeal in *Wende* had affirmed the judgment without conducting an independent search of the record for issues. *Id.* But the California Supreme Court held that *Anders* required the lower appellate court to conduct an independent review of the entire record. *Id.* at 441. The state supreme court also held that counsel need not move to withdraw from the case so long as he had informed his client of the latter's right to ask that counsel be relieved and had not argued against the client by describing the appeal as frivolous. *Id.* at 442.

Since then, in addition to the *Wende* reforms, the State of California has also erected an extensive and elaborate system of appellate projects designed to protect the rights of indigent appellants by providing multiple safeguards in the assignment, oversight and review of such cases. The protections California has implemented far exceed those envisioned by *Anders*.

The Ninth Circuit overlooked the practical and historical context in which California's no-merit procedure arose, mechanically rejecting the *Wende* procedure because it was not an exact duplicate of *Anders*. The central issue presented by this case is therefore the degree to which the lower federal courts are authorized to



intervene in the state courts' implementation of indigent criminal defendants' federal constitutional rights.

The Ninth Circuit immediately followed *Robbins* in two other published decisions, holding that the *Wende* procedure required habeas corpus relief even under the new standard of review of the Anti-terrorism and Effective Death Penalty Act, without even waiting to see if certiorari had been granted or denied in this case. *Delgado v. Lewis*, 168 F.3d 1148 (CA9 1998); *Davis v. Kramer*, 167 F.3d 494 (CA9 1998). The Warden submits that the states should be permitted to help shape the rules in this evolutionary process. Cookie-cutter adherence to *Anders* is neither necessary under this Court's precedents nor desirable as a matter of policy.

#### B. Precursors of *Anders*

*Anders* was one of a series of cases in which this Court reviewed the fair-trial/fair-appeal rights of indigent criminal defendants. In these cases, the Court declared that indigents were entitled to representation that was substantially equal to that which defendants and appellants with retained counsel could obtain.

In *Griffin v. Illinois*, the Court held that where a state allowed appellate review of criminal cases, due process and equal protection required it to afford impoverished appellants a review as adequate as that given appellants who could afford to pay. *Griffin*, 351 U.S. 12, 19 (1956). At issue in *Griffin* was the appellant's right to have the state provide him with a trial transcript free of charge. *Id.* The *Griffin* Court found that due process and equal protection required the state to provide an indigent appellant with a free transcript of the trial proceedings or find some other way to provide him with "adequate and effective appellate review." *Id.*

In *Gideon v. Wainwright*, 372 U.S. 335, this Court construed the Sixth and Fourteenth Amendments to

require the state to provide an indigent criminal defendant with appointed counsel to represent him at trial. *Id.* at 344 ("recogniz[ing] that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him[']"). In *Douglas v. California*, a companion case to *Gideon*, this Court held that a criminal appellant could not be denied the assistance of counsel on his first appeal as of right on the basis of his indigence. *Douglas*, 372 U.S. 353, 356-57 (1963); *see also Swenson v. Bosler*, 386 U.S. 258, 259 (1967) (counsel must be available to prepare and file a brief).

#### C. The Decision in *Anders v. California*

Four years after *Gideon* and *Douglas*, and following hard on the heels of *Bosler*, this Court decided *Anders v. California*, in which it announced the Sixth Amendment right of indigent appellants to counsel, even when they had no nonfrivolous issues to assert, and applied its holding to the states through the due process and equal protection clauses of the Fourteenth Amendment. *Anders*, 386 U.S. at 741; *see also Evitts v. Lucey*, 469 U.S. 387, 403 (1985) (right of an indigent to effective assistance of counsel on appeal has its source in both the due process and equal protection clauses).

"Due Process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. 'Equal protection,' on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable."

*Evitts v. Lucey*, 469 U.S. at 405 (footnote omitted).

In *Anders*, state appellate counsel had written a letter to the state reviewing court, simply explaining that he



would not file a brief because he believed the appeal had no merit. *Anders v. California*, 386 U.S. at 741-42. This Court held that a criminal appellant may not be denied representation on appeal based on appointed counsel's unsupported conclusion that he or she is of the opinion that there is no merit to the appeal. Counsel's bare assertion was an inadequate substitute for the attorney's acting as a vigorous advocate on behalf of his indigent client. *Id.* at 741-42. This Court concluded that California's no-merit letter procedure had denied the indigent his right to appellate counsel in violation of equal protection and due process. *Id.* at 741, 744. Since counsel had not acted as an advocate, his performance could not be reviewed. The error was therefore presumptively prejudicial.

In the course of disapproving the simple letter-brief procedure at stake in *Anders*, the Court also delineated procedures that would secure for an impoverished appellant the constitutional rights it had identified. The Court did not hold that these suggested procedures were compulsory or that they should be taken as a fixed and unyielding code of appellate procedure mandated to be enacted in every jurisdiction. *Anders*, 386 U.S. at 744.

The *Anders* Court acknowledged that an attorney may withdraw without denying the appellant counsel when the withdrawal is accompanied by certain safeguards. *Anders*, 386 U.S. at 744. If, after conscientiously examining the record, counsel concludes that the appeal is wholly frivolous, he may seek leave to withdraw, accompanying his request with a brief that refers to anything in the record that might arguably support an appeal. *Id.* When it receives a no-merit brief, the appellate court has the duty to conduct its own independent examination of the record to see if any nonfrivolous issues exist. If the court agrees with counsel's assessment, it may determine the appeal on the merits without assistance from counsel. *Id.* However, the court is obliged to appoint counsel to argue

the appeal if it finds nonfrivolous issues that might be raised. *Id.*

As this Court later explained in *McCoy v. Wisconsin*, 486 U.S. 429, 442 (1988), a state appellate court has two responsibilities when a no-merit brief is filed. First, the court must make certain that counsel has diligently and thoroughly searched the trial record for arguable claims. Second, the court must assure itself that appointed counsel is right in concluding that there were no nonfrivolous claims to raise.

#### **D. California Expanded the *Anders* Protections**

In the wake of *Anders*, appointed appellate counsel faced a dilemma described in Justice Stewart's *Anders* dissent:

The Court today holds [the no-merit letter] procedure unconstitutional and imposes upon appointed counsel who wishes to withdraw from a case he deems "wholly frivolous" the requirement of filing "a brief referring to anything in the record that might arguably support the appeal." But if the record did present any such "arguable" issues, the appeal would not be frivolous and counsel would not have filed a "no-merit" letter in the first place.

*Anders*, 386 U.S. at 746. Ever since, California has been attempting to reconcile counsel's constitutional responsibilities to the client with the concomitant responsibility not to bring frivolous appeals.

The California Supreme Court promptly construed and applied *Anders*, finding that a no-merit letter no longer sufficed when counsel could find no arguable issues. *People v. Feggans*, 67 Cal. 2d at 447-48. Instead, counsel was required to prepare a brief to assist the court in understanding the facts and legal issues. The brief was to include a statement of facts with citations to the record,

a discussion of the legal issues with citations to authority and argument of all arguable issues. *Id.* at 447. If counsel concluded the appeal was frivolous, he could ask to withdraw but would not be permitted to do so until the appellate court was satisfied that he had discharged his duty to his client and the court to provide a statement of the facts and legal issues. *Id.* If counsel withdrew, the appellant was to be given the opportunity to file a brief in propria persona, after which the court was to decide for itself whether the appeal was frivolous. *Id.* If any claim was "reasonably arguable," regardless of how the court believed it would be resolved, the court was obligated to appoint new counsel to argue the appeal. *Id.* at 448.

In 1979, the California high court under Chief Justice Rose Bird refined the state procedure for implementing the due process and equal protection rights to counsel that had been declared in *Anders*. *People v. Wende*, 25 Cal. 3d at 441-42. The *Wende* court was not engaged in the systematic contraction of the rights of criminal defendants. Indeed, the state supreme court found that *Anders* was intended to increase protections for indigent no-merit appellants and undertook the *Wende* reforms in order to expand those rights. *Id.* at 441-42.

The *Wende* court adopted the *Anders* determination that a brief by counsel was a great improvement over a no-merit letter, because the brief assisted the court by referring to the trial record and legal authorities. *Id.* However, the court determined that neither *Anders* nor *Feggans* required counsel to state explicitly that he had found no arguable issues, because his failure to identify arguable issues could be inferred from his failure to raise any. *Id.* at 442.

In addition, the *Wende* court devised a method to permit counsel to remain available to assist his indigent client during the course of the appeal. Counsel did not have to withdraw, the court reasoned, if he informed his client of the latter's right to have counsel relieved and if

counsel had not disabled himself by describing the appeal as frivolous. *Id.*

*Anders* required "a brief referring to anything in the record that might arguably support an appeal. *Anders*, 386 U.S. at 744. The *Wende* court held that requirement was satisfied by a procedural summary and a statement of facts, with citations to the record. *Wende*, 25 Cal. 3d at 438, 442. Unlike the Ninth Circuit, the California court held that *Anders* did not require counsel to set forth his efforts and failure to find issues. *Id.* at 442. It reasoned that counsel's failure to find issues could be inferred from his failure to raise any. *Id.*

The *Wende* court concluded that the filing of a no-merit brief triggered the appellate court's duty to make an independent review of the record, even if the appellant did not submit a brief in propria persona. *Id.* at 441-42. The court specifically recognized that counsel's filing of a no-merit brief might ultimately secure the indigent client a more complete review than the client might receive after a merits brief had been filed. *Id.* at 442. This explanation confirms that the court's purpose was to enlarge the rights guaranteed by *Anders*, not to reduce them.

### 1. The Reviewing Court's Responsibilities

Although the California procedure varies somewhat from *Anders* in its particulars, it nonetheless assures that the state appellate court will fulfill the two responsibilities this Court has identified when a no-merit brief is filed. *McCoy*, 486 U.S. at 442. The first obligation of the court is to ascertain that counsel for an indigent appellant has diligently searched the record. The court is well able to reassure itself of counsel's diligence in a *Wende* appeal. Initially, counsel's citations to the record in support of his procedural history and statement of facts are a palpable demonstration that he has assiduously searched the trial record for arguable claims. In addition, appellate counsel



has declared under penalty of perjury that he has reviewed the entire record on appeal. Further, his appellate project reviewer also will have searched the record for issues. And finally, counsel is aware that the court will conduct its own independent search. With all these safeguards and layers of scrutiny, counsel's diligence is firmly assured.

The second duty of the court is to ascertain whether counsel was correct in concluding that the appeal is meritless. *McCoy*, 486 U.S. at 442. In California, the oversight of a skilled appellate project reviewer, in conjunction with the court's own independent review, assures the accomplishment of this goal. If the court finds any arguable issues, counsel must brief them.

The *Wende* procedure has been evolving for more than 30 years, applied in tens of thousands of no-merit appeals, without any challenge to its constitutionality until the 1997 decision in *Robbins*. The reason is plain: the state's bench and appellate bar reasonably believe that the *Wende* procedure fully vindicates the equal protection and due process rights of indigents to counsel on appeal.

## 2. California's Appellate Projects

California's courts have taken other measures to strengthen and expand *Anders*. In 1985, the California Judicial Council adopted Rule 76.5 of the California Rules of Court. *People v. Hackett*, 36 Cal. App. 4th 1297, 1311, 43 Cal. Rptr. 2d 219 (Cal. 1995). The rule required the state appellate courts to evaluate the qualifications of appointed counsel so that the attorney's skill corresponded to the length and complexity of the case and authorized the courts to delegate this responsibility to an administrator who had "substantial experience in handling criminal appeals." *Id.* The task has been delegated to five appellate project administrators and their "able and experienced [staff] lawyers." If appointed counsel cannot

find any non-frivolous issues, the supervising appellate project attorney searches the record again before authorizing the filing of a no-merit brief. *Id.*

The California Academy of Appellate Lawyers filed an amicus curiae brief in support of the Warden's petition for writ of certiorari. In that brief, the Academy informed the Court that the appellate projects provide indigent appellants with multiple levels of internal independent advocacy review. Initially, they evaluate the case in order to assign it to an appropriately experienced and skilled panel attorney. C.A.A.C. 6.<sup>2</sup> If the panel attorney is deemed proficient enough to work the case independently, he provides all legal services but consults with the project attorney. *Id.* When an "independent" panel attorney believes a no-merit brief should be filed, a project attorney reviews the record to provide a second opinion. *Id.* at 7.

Nearly half of the panel attorneys handle cases on an "assisted" basis. In those cases, a project attorney extensively reviews the trial record, identifying issues for the panel attorney to consider. *Id.* at 6. After that, the panel attorney conducts his own separate record review. *Id.* at 6, 7. Should panel counsel determine that there are no arguable issues, the staff attorney for the appellate project reviews the entire record to be certain that appointed counsel has not overlooked anything. *Id.* at 7.

As a practical matter, a no-merit brief is never filed in California without the concurrence of both the assigned panel attorney and the appellate project staff attorney. Thus, an indigent California appellant is given multiple independent reviews by at least two attorneys acting to protect the client's rights, even before the case is submitted to the court of appeal. C.A.A.C. 6-8. And,

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2. The abbreviation "C.A.A.C." refers to the California Academy of Appellate Lawyers' amicus curiae brief in support of the Warden's petition for certiorari.

finally, the court conducts its own independent review of the entire record. *Hackett*, 36 Cal. App. 4th at 1311. In this way, and in the *Wende* procedure itself, indigent appellants' equal protection and due process rights to counsel are fully satisfied.

### 3. Equal Protection

The 14th Amendment equal protection clause is implicated when the state gives disparate treatment to individuals who are similarly situated. *Evitts v. Lucey*, 469 U.S. at 405. There is no basis to believe that California's indigent defendants are treated worse than their moneyed brethren. Quite the contrary.

The multi-layered and -reviewed process of preparing and deciding a brief involving an impoverished appellant has been described above. In contrast, it is highly improbable that a defendant represented by retained counsel who files a merits brief on appeal would ever have more than his attorney's independent search of the record for issues -- and without any institutional review or oversight. And the court, confronted with a merits brief, is obliged to resolve only the issues counsel has raised, not to conduct an independent search for issues. As the *Wende* court recognized, appointed counsel filing a no-merit brief on behalf of an indigent client may well obtain a more complete review than retained counsel could procure. *Wende*, 25 Cal. 3d at 442.

As the Chief Justice wrote more than a decade ago, equal protection is a component of the decisions extending the Sixth Amendment right to counsel on appeal. *Penson v. Ohio*, 488 U.S. 75, 90 (1988) (diss. op. of Rehnquist, C.J.). Even so, the state's federal constitutional duty . . . is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an

adequate opportunity to present his claims fairly in the context of the State's appellate process. *Pennsylvania v. Finley*, 481 U.S. at 556, quoting *Ross v. Moffitt*, 417 U.S. 600, 616 (1974). This Court has expressly rejected the notion "that when a State chooses to offer help to those seeking relief from convictions, the Federal Constitution dictates the exact form such help must assume." *Finley*, 481 U.S. at 559. Indeed, the states have "substantial discretion" as to how they assist criminal defendants during the post-conviction review process. *Id.*

If there is any disparity in California's current handling of indigent criminal appeals, it is not that the state discriminates against indigent appellants with non-meritorious appeals. On the contrary, indigent no-merit appellants get more layers of advocacy review and fuller judicial review than that given indigent merits appellants, and far more than what is normally available to appellants with retained counsel.

### 4. Due Process and the Right to Counsel

The due process clause of the 14th Amendment requires an assessment of the fairness of the individual's treatment by the state, without comparison to the state's treatment of other individuals. *Evitts v. Lucey*, 469 U.S. at 405.<sup>3</sup>

California has addressed the due process concern by providing indigent appellants with (1) multiple independent advocates' reviews, (2) representation by

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3. Not all jurists concede that a due process analysis is applicable to the right to effective assistance of appellate counsel. *Evitts*, 469 U.S. at 410 (diss. op. of Rehnquist, J.) ("the concept of due process in criminal proceedings is addressed almost entirely to the fairness of the trial"); *Ross v. Moffitt*, 417 U.S. 600, 610-11 (1974) ("There is no Due Process requirement for the state to provide a defendant with counsel to bring a discretionary appeal . . .").



counsel selected, appointed and supervised by the appellate project, which is comprised of other counsel of demonstrated expertise, and (3) an independent court review. These procedures ensure that an indigent appellant with a no-merit brief receives a full measure of any process the 14th Amendment guarantees him.

The due process clause does not compel a state to provide an appellate process for criminal defendants at all. *Goeke v. Branch*, 514 U.S. 115, 120 (1995). However, when a state provides an appeal, an indigent criminal defendant is entitled to counsel on his first appeal of right. *Anders*, 386 U.S. at 742. The entitlement to counsel includes impoverished appellants whose counsel can find no arguable issues. *Id.* at 743.

#### 5. Vindication of Robbin's Sixth and Fourteenth Amendment Rights on State Appeal

Robbins's state appellate counsel filed a brief that meets the constitutional requirements of *Anders*, as properly interpreted by California in *Feggans* and *Wende* and enhanced by the "projects" system. J.A. 26-37. The brief contained a two-page statement of the case and a detailed six-page statement of facts, with references to the record, from which the reviewing court could ascertain that counsel had searched the record. J.A. 27-34. In addition, counsel requested that the court independently examine the record. J.A. 35.

In his state-court declaration in support of the request for an independent review, counsel stated he had reviewed the entire record on appeal, examined the trial court file and exhibits and discussed the case with the attorney who had represented Robbins in the trial court before Robbins waived counsel. J.A. 36. The attorney also wrote to Robbins, explaining his evaluation of the appellate record and his intention to file a no-merit brief. *Id.* Counsel

informed Robbins of his right to file a supplemental brief, sent Robbins the trial transcripts and advised Robbins of his right to seek to have counsel removed. *Id.* Counsel did not withdraw as counsel of record but remained available to brief any issues that the court might identify. J.A. 35, 36. Before filing the no-merit brief, counsel consulted with the supervising California Appellate Project attorney, who concurred in his decision and gave him permission to file it. J.A. 43. Robbins also filed a six-page brief on his own behalf. J.A. 39. And finally, the appellate court independently reviewed the record for error. *Id.*

The procedure employed in this case not only protected Robbins's due process and equal protection interests in effective assistance of counsel on appeal but also aided the court in establishing that counsel had conducted a thorough search and finding that he was correct in concluding there were no arguable issues.

#### E. Nothing in This Court's Post-Anders Jurisprudence Undermines Wende

This Court's subsequent decisions on this issue do not support the Ninth Circuit's actions in *Robbins v. Smith*.

##### 1. Jones v. Barnes

In 1983, this Court limited the *Anders* holding in *Jones v. Barnes*, 463 U.S. 745, 751 (1983). There, the indigent appellant had informed appellate counsel that he wanted seven claims raised. *Id.* at 748. Counsel raised three of the client's suggested issues but rejected the rest on grounds that they either would not assist the client to secure a new trial or there was no evidence in the record to support them. *Id.* at 747-48. The *Barnes* Court held:

Neither *Anders* nor any other decision of this Court suggests, however, that the indigent

defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points.

*Id.* at 751. In fact, "[f]or judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy that underlies *Anders*." *Id.* at 754. The Court explained that generally a case presents at most a few significant issues, and the addition of weak issues dilutes the strength of those that are stronger. *Id.* at 752. With the exception of three rights personal to the defendant at trial but not relevant on appeal, it is the attorney's duty to take professional responsibility for the case's management in consultation with his client. *Id.* at 752, 753 n.6. The Court emphasized "the importance of [counsel's] winnowing out weaker arguments on appeal[.]" *Id.* at 751. The Ninth Circuit's decision in *Robbins* is contrary to *Anders*, as explained in *Barnes*.

There is no reason to distinguish analytically between counsel who file merits briefs and those who file no-merit briefs. The reasoning in *Jones v. Barnes* can and should be applied to indigent no-merit appeals.

## 2. Pennsylvania v. Finley

Four years after its decision in *Jones v. Barnes*, this Court affirmed the "substantial discretion" of the states to develop and implement postconviction review procedures within the *Anders* framework. *Pennsylvania v. Finley*, 481 U.S. at 554-55, 559. In *Finley*, this Court found that an indigent defendant who was bringing a collateral attack on his conviction had no federal constitutional right to counsel. *Id.* at 555. Consequently, the state had no equal protection duty to clone the legal forces that a criminal

defendant of means might bring to bear in seeking a reversal, but only to afford him a fair chance to present his appellate claims. *Id.* at 556; *Ross v. Moffitt*, 417 U.S. at 616. The *Finley* decision acknowledges that flexibility is preferable to forcing the states to march in lock-step. Although *Finley* was determined in the context of a collateral postconviction proceeding, its respect for state courts' understanding of the Constitution, and commitment to following it, apply with equal vigor to a first appeal as of right.

## 3. McCoy v. Court of Appeals of Wisconsin

In 1988, this Court issued decisions in *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, and *Penson v. Ohio*, 488 U.S. 75. Because of their unusual facts, the application of *Penson* and *McCoy* is narrow and limited. They do not affect the central analysis of *Anders*, and they provide no support for the Ninth Circuit's invalidation of *Wende*.

In *McCoy*, appellate counsel purposely violated a Wisconsin rule of court which required counsel to state why he thought the appeal was baseless. Believing the rule was unethical and contrary to *Anders*, counsel sought to have it declared unconstitutional. *McCoy*, 486 U.S. at 432-33. The Wisconsin Supreme Court rejected McCoy's argument, as did this Court. *Id.* at 433-34, 442-43. Premising its decision on equal protection and the Sixth Amendment right to counsel, this Court stated that it did not expect an *Anders* brief to serve as a substitute for an advocate's brief, but only to assist the state reviewing court in deciding whether the appeal is so frivolous that the defendant has no federal constitutional right to have counsel present the case to the court. *McCoy*, 486 U.S. at 439-40 n.13. It held that appointed counsel's motion to withdraw from a frivolous appeal does not provide an indigent defendant with less effective representation than



one who is represented by retained counsel. *McCoy*, 486 U.S. at 437-38.

The Warden submits that *McCoy* merely approves Wisconsin's method of handling indigent appeals. It does not purport to discredit other interpretations of *Anders*. All that *Anders* guarantees an indigent defendant is "a diligent and thorough review of the record and an identification of any arguable issues revealed by that review." *McCoy*, 486 U.S. at 439. The *McCoy* Court did not envision the no-merit brief as a substitute for an advocate's brief on the merits. Instead, the no-merit brief was designed to assist the court in deciding whether the appeal was so frivolous that the criminal appellant did not have a federal constitutional right to counsel. *McCoy*, 486 U.S. at 439-40 n.13.

Although it relates to a procedure quite different from California's, the *McCoy* decision validates the idea that a state should have the flexibility to implement *Anders* in accordance with that state's needs and that a no-merit brief need not substitute for an advocate's brief. Under *McCoy*, there is no reason to jettison California's no-merit brief procedure.

#### 4. *Penson v. Ohio*

Some months after its decision in *McCoy*, this Court decided *Penson v. Ohio*, reaffirming an indigent's right to counsel on appeal. 488 U.S. 75. In *Penson*, appellate counsel declined to file a brief in a case he believed meritless and instead filed a "Certification of Meritless Appeal," which resembled the letter brief disapproved in *Anders*. *Penson*, 488 U.S. at 80-81 and 81 n.3. Counsel's no-merit certification erroneously failed to draw attention to anything in the record that might have supported the appeal, leaving the Ohio court with no basis for concluding counsel had performed his duty carefully. *Penson*, 488 U.S. at 81-82. By way of contrast, California's

appointed attorneys provide detailed citations to the record, which demonstrate to the court that counsel has met his responsibilities. In addition, the Ohio reviewing court erred in granting counsel's request to withdraw from the case before it had independently reviewed the record. *Id.* at 82-83. "Most significantly, the Ohio court erred by failing to appoint new counsel to represent petitioner after it had determined that the record supported 'several arguable claims.'" *Id.* at 83. In *Penson*, this Court held that the identification of arguable issues by the Ohio reviewing court made it mandatory to appoint counsel to brief them, and the error in failing to do so was reversible per se. *Id.* at 85-86. *Penson* is inapplicable to the *Wende* procedure, because an indigent California appellant is never without counsel.

Neither *Anders* nor the federal Constitution required the Ninth Circuit to upset *Wende*. The California procedure addresses Robbins's due process and equal protection rights to appellate counsel. It provides sufficient information so that the court can be assured that counsel has performed a diligent and thorough review of the record in his search for issues, and the court can make its own independent review.

The appropriate question for the Ninth Circuit to have asked is whether the state procedure under consideration "is consistent with [the Supreme Court's] holding in *Anders*." *McCoy*, 486 U.S. at 440. It is. Nothing in the federal Constitution and nothing in this Court's cases supports the Ninth Circuit's programmatic and unyielding application of *Anders*. Nothing in the federal Constitution and nothing in this Court's cases warranted the Ninth Circuit's decision to annul California's *Wende* procedure.

## II.

STATE APPELLATE COUNSEL'S  
PERFORMANCE SHOULD HAVE BEEN  
EVALUATED UNDER *STRICKLAND* v.  
*WASHINGTON*

In *Robbins*, the Ninth Circuit did not merely find that state appellate counsel's failure to raise any issues on appeal constituted error. It also found that the error amounted to a denial of counsel and was thus presumptively prejudicial. J.A. 87-90, 94. The federal appellate court relied for its finding on this Court's decision in *Penson v. Ohio*, J.A. 85, 94, and now has explicitly rejected the contention that counsel's performance should be evaluated in accordance with *Strickland v. Washington*, 466 U.S. 668. *Delgado v. Lewis*, 168 F.3d 1148 ("Delgado did not need to show prejudice because the failure of his counsel to raise arguable issues in the appellate brief creates a presumption of prejudice"); *Davis v. Kramer*, 167 F.3d at 499 ("No separate *Strickland* competence analysis is called for when counsel fails to comply with *Anders*"). Once again, there is no basis in this Court's decisions or in the federal Constitution for this drastic conclusion.

In California, under the *Wende* procedure, an indigent appellant is never without counsel. Moreover, counsel who files a no-merit brief secures a significant benefit for his client: the court's independent review, to which he would otherwise not be entitled. Under these circumstances, presuming prejudice is not only needless but also unfair to the state. This Court's established *Strickland* procedure for evaluating the performance of counsel is the apt and obvious analytical tool.

A. The Two-Part *Strickland* Test for Ineffective Assistance

The touchstone is settled. Where a represented defendant asserts ineffective assistance, his claim will be subjected to the "rigorous standard" for ineffective-assistance claims dictated by the two-part *Strickland* test. *Kimmelman v. Morrison*, 477 U.S. 365, 380 (1986); *see also Lockhart v. Fretwell*, 506 U.S. at 369; *Strickland*, 466 U.S. at 687. In order to prevail, a defendant must first overcome a strong presumption that counsel's performance was reasonable and demonstrate that it was objectively deficient. *Id.* at 689. In addition, the defendant must show prejudice, which requires that he prove that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. *Strickland* requires reviewing courts to presume the adequacy of counsel's assistance, assess attorney performance as of the time counsel was required to act, and avoid the distortions of hindsight. *Id.* at 689-90. *Robbins* could never have demonstrated prejudice, because, even if his claims were nonfrivolous in the abstract, there was no factual basis for them in the record to which the appeal was confined, and thus no possibility of success.

In *Lockhart v. Fretwell*, a capital case, this Court held that trial counsel's failure to make an objection that would have been successful at the time under a later-overruled decision rendered neither the trial fundamentally unfair nor the result unreliable. *Lockhart*, 506 U.S. at 366. The Court noted that the Sixth Amendment does not come into play unless counsel's unprofessional conduct affects the trial's reliability. *Id.* at 369. Put another way, in order to demonstrate prejudice, the defendant must establish that counsel's defaults rendered the proceeding unreliable or fundamentally unfair. *Lockhart*, 506 U.S. at 369-70; *United States v. Cronin*, 466 U.S. 648, 658, 659 n.26 (1984);



see also *Williams v. Taylor*, 163 F.3d 860, 869 (CA4 1998), cert. gtd. at 67 U. S. L. W. 3613, 1999 U.S. Lexis 2522 (4/5/99) ("*Lockhart's* emphasis on reliability and a fair trial simply clarified the meaning of prejudice under *Strickland*.")

The Ninth Circuit relied on *Penson v. Ohio* to support its preference for a presumption of prejudice rather than the application of *Strickland*. *Penson* is inapplicable on its facts. There, the state reviewing court had erred in granting counsel's request to withdraw from the case before it independently reviewed the record and, even more significantly, in failing to appoint new counsel to represent *Penson* after it had found "several arguable claims." *Penson*, 488 U.S. at 82-83. Because those two state-court failures left *Penson* without counsel, the errors were reversible per se. *Id.* at 86.

By way of contrast with *Penson*, California's approach neither prematurely grants a motion to withdraw nor forces an appellant with nonfrivolous issues to go forward without legal counsel. Since counsel remains available to assist his client and is assigned to brief any issues the California reviewing court identifies as arguable, it is neither necessary nor appropriate to apply a standard of per se reversibility to the *Wende* procedure. Counsel's performance should be evaluated in accordance with the usual standards for effective assistance.

As this Court has explained, most constitutional errors are subject to harmless-error analysis. *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991). This is so because most errors occur during the presentation of the case at trial and can be evaluated in the context of the remaining evidence to determine prejudice. *Fulminante*, 499 U.S. at 307-08. The few errors subject to per-se reversal are "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." *Id.* at 309. The total denial of counsel and the presence of a biased judge are two often-cited

examples of structural error. *Id.* at 309 n.8; see also *Strickland*, 466 U.S. at 692; *Cronic*, 466 U.S. at 659 n.25. Structural errors, in other words, are those which infect the entire framework of the trial, as opposed to errors in the trial itself. *Fulminante*, 499 U.S. at 310.

The claimed error in failing to raise any issues on appeal under California's *Wende* procedure is not structural error, because prejudice can be readily evaluated on the basis of the appellate record, which is available for the court's review. In that sense, there is no meaningful distinction between counsel who raises a single issue on appeal and one who raises no issues at all. In fact, the Warden respectfully suggests that the Ninth Circuit's decision poses a different kind of equal protection problem, because appellants whose lawyers file merits briefs must demonstrate prejudice, while those whose attorneys file no-merit briefs enjoy a presumption of prejudice. In the instant case, for example, if appointed counsel had pressed but one of the meritless claims Robbins sought to assert, Robbins would have had to prove both sub-standard performance and prejudice. Because counsel declined to raise any issues, Robbins has received a per-se-reversal windfall. All appellants claiming inadequate counsel ought to be required to show both deficient performance and resultant prejudice.

Counsel who files a no-merit brief can also be compared to defense counsel at trial who makes no objections and puts on no affirmative defense. Like appellate counsel, a trial attorney need not manufacture a defense or engage in unethical practices. *United States v. Cronic*, 466 U.S. at 656-57 n.19. Trial counsel's performance under those circumstances, even if below the norm, is not presumed prejudicial and reversible per se. It is subjected to *Strickland* analysis, which requires the defendant to demonstrate both deficient performance and a fundamentally unfair result. *Lockhart v. Fretwell*, 506 U.S. at 369-70.

Since a direct appeal is confined to matters in the trial record, the mechanics of evaluating appellate counsel's performance -- regardless of whether he does or does not raise issues -- are far simpler than those required to assess trial counsel's. Indeed, the only reason to presume prejudice in a case such as this is an abiding distrust in counsel and the state courts -- a belief that "competent" appellate counsel can always find *something* to raise, coupled with a suspicion that appellate courts do not conduct a genuinely independent review. As a practical matter, the Ninth Circuit's decision declares that there is no such thing as a frivolous appeal.

More than three decades ago, Justice Stewart, writing in dissent, explained that the "quixotic" *Anders* rule could only be premised "upon the cynical assumption that an appointed lawyer's professional representation to an appellate court in a 'no-merit' letter is not to be trusted. That is an assumption to which I cannot subscribe." *Anders*, 386 U.S. at 746-47 (diss. op. of Stewart, J.). The recent opinions of the Ninth Circuit in *Robbins*, *Davis* and *Delgado* display that cynicism in full flower.

Such suspicions are utterly unfounded, especially in this case, because California provides multiple layers of advocacy review before the case ever reaches the appellate court. A rule of per se reversal makes no sense, as applied to California's *Wende* procedure.

In the instant case, heedless of *Fulminante*, the Ninth Circuit analyzed counsel's good-faith and reasonable professional judgment in *Robbins* as if it amounted to a denial of counsel akin to *Gideon*. Nothing could be further from the truth. In the Ninth Circuit's expansive view, the law library and counsel issues should have been raised. Even assuming for argument's sake that those issues were merely weak rather than frivolous, a reviewing court can readily determine they could not possibly have been successful, because Robbins, foundering through his trial in pro per, had made no trial record to support them.

Even assuming arguendo that the issues could have been raised on appeal, none of them even remotely demonstrate that the result of the trial was unfair or unreliable.

#### B. Strickland's Application to the Case at Hand

In the instant case, Robbins suggested numerous putatively nonfrivolous appellate issues. J.A. 1, 7, 45, 81. The Ninth Circuit and district court identified only two that should have been, but were not, raised by state appellate counsel: the adequacy of the jail's law library and the propriety of the trial court's denial of Robbins's motions relating to the appointment of counsel of his choice and advisory counsel in place of the public defender. J.A. 51-52, 88-89. In their haste to identify viable appellate claims, the lower federal courts overlooked a fatal flaw, one that was obvious to Robbins's state appellate counsel. State appellate counsel understood that both claims were perfectly frivolous because neither claim had been preserved for appeal by a timely and specific objection at trial. Robbins himself refuted both claims with his on-the-record statement to the trial court just eight days before the trial. Robbins insisted on representing himself, but asked for advisory counsel:

... I would like to have the assistance of counsel at the trial. I am not real good at public speaking. I am doing okay as far as the law work and stuff. Obviously, I am not a lawyer, but I need somebody to help me present the case.

J.A. 300, 320. The lower federal courts were wrong to believe that these two issues were nonfrivolous. They compounded their error by determining that these claims



entitled Robbins to the windfall of an automatic reversal and a new appeal.

### 1. Adequacy of the Law Library

Deficiencies in the law library were first mentioned in the supplemental petition in the district court, not as a "claim," but as an example of Robbins's contention that he was denied the opportunity to prepare a meaningful defense. C.R. 25 at 8, 28-29.<sup>4</sup> The District Court, with the Ninth Circuit's ultimate concurrence, sua sponte transformed Robbins's law library illustration into an arguable appellate issue. J.A. 49-51, 89. At no time before or during the trial did Robbins claim that the jail law library was lacking, let alone constitutionally deficient. Not surprisingly, he presented no evidence to support such a conclusion. Nothing in the record shows that the jail law library was actually inadequate. Indeed, there was nothing in the record to show what the conditions of the library actually were. There was, quite simply, nothing to appeal.

On May 2, 1990, when Robbins announced he would not be ready for the May 16 trial date, the court warned Robbins about the hazards of self-representation, painting a bleak picture of the process and likely result, including a discouraging description of the law library.<sup>5</sup> J.A. 255-57.

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4. "C.R." refers to the clerk's record in the United States District Court.

5. It was entirely proper for the trial court to make petitioner aware of the possible limitation or suspension of his pro per privileges, including access to the law library. *People v. Davis*, 189 Cal. App. 3d 1177, 1195 n.19, 234 Cal. Rptr. 859 (Cal. 1987); overruled on another point in *People v. Snow*, 44 Cal. 3d 216, 225, 242 Cal. Rptr. 477 (Cal. 1987).

The trial judge's warning about the law library were hyperbolic. Robbins never complained to the trial court -- or any other state court -- that the law library was inadequate. On the contrary, Robbins did "okay as far as the law work and stuff." J.A. 320. Under California law, failure to object at trial forfeits Sixth and Fourteenth Amendment claims on appeal. *People v. Sanders*, 11 Cal. 4th 475, 510 n. 3, 521 n. 14, 46 Cal. Rptr. 2d 751 (Cal. 1995). In addition, it is settled California law that the factual basis for a direct-appeal claim must appear on the face of the record and, even if Robbins had objected, there was no evidence adduced at trial to permit relief on this claim on appeal. Cal. R. Ct. 4, 5; *In re Kathy P.*, 25 Cal. 3d 91, 102, 157 Cal. Rptr. 874 (Cal. 1979). Because Robbins failed to object to the law library at trial, the issue was outside the record and could not have been raised on direct appeal. It would have been fruitless for state appellate counsel to raise a claim that was not merely waived by the lack of an objection in the trial court, but was affirmatively refuted by Robbins himself.

On the merits, the law library claim was plainly frivolous as well. California law requires a showing of prejudice from a defendant who alleges that he has been denied adequate access to legal materials. *People v. Davis*, 189 Cal. App. 3d at 1195. Whatever the library's limitations, Robbins himself assured the trial court that he was not prejudiced. Just eight days before trial, on August 9th, he told the trial court "[he was] doing okay as far as the law work and stuff[.]" but needed someone to help him with the public speaking. J.A. 320.

The rest of the pretrial record corroborates Robbins's assurances. Robbins had used the library. He filed numerous researched motions with the court. *See, e.g.*, J.A. 268-71. His up-to-the-minute assessment a week before trial that the law library was adequate for his needs was verified by his written pleadings. J.A. 320. In other



words, Robbins could not possibly have shown prejudice on appeal, even if he had been able to raise the claim.

The canons of professional ethics limit permissible advocacy. Neither privately retained nor appointed counsel is free to clog the courts with frivolous motions or appeals. *Polk County v. Dodson*, 454 U.S. 312, 323 (1981). In California, the Rules of Professional Conduct state:

A member shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is:

....  
(B) To present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of such existing law.

Rule 3-200, Cal. R. Prof. Conduct. An issue which is without a factual or legal basis is plainly frivolous. *People v. Johnson*, 123 Cal. App. 3d 106, 109, 176 Cal. Rptr. 390 (Cal. 1981). As counsel understood, he was ethically precluded from raising a baseless issue which would necessarily have failed on appeal. Robbins has failed to show deficient performance, let alone prejudice.

## 2. Counsel

Nor did counsel have available a nonfrivolous claim relating to the appointment of counsel at trial. Over many months' time, Robbins compiled a considerable record of attempting to manipulate the system to his own ends, including no less than seven of-record hearings before four different superior court judges, relating to his requests to dismiss the public defender, have counsel of his choice appointed to represent him, represent himself, and obtain

advisory counsel to assist him.<sup>6</sup> J.A. 95-119, 166-207, 208-43, 244-50, 251-67, 283-99, 300-25. Notwithstanding Robbins's demonstrated unwillingness to cede control of his case back to the public defender, J.A. 322-23, the Ninth Circuit held that the state court's denial of Robbins's attempt to withdraw the waiver of his right to counsel was erroneous. J.A. 88. The predicate of this determination was faulty: there was no of-record showing that Robbins ever attempted to withdraw his waiver of counsel. Because the court's conclusion is without support in the record, this issue, as well, would have been frivolous on direct appeal.

A defendant who knowingly and intelligently chooses to represent himself has a right to do so under the federal constitution. *Faretta v. California*, 422 U.S. 806, 807 (1975). In order for his election to be knowing and intelligent, the defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." *People v. Pinholster*, 1 Cal. 4th 865, 928, 4 Cal. Rptr. 2d 765 (Cal. 1992) (internal quotation marks omitted).

### a. Advisory Counsel

However, a criminal defendant does not have a right both to be represented by counsel and to represent himself. "Indeed, such an arrangement is generally undesirable." *People v. Clark*, 3 Cal. 4th 41, 97, 10 Cal. Rptr. 2d 554 (Cal. 1992); see also *McCaskle v. Wiggins*, 465 U.S. 168, 183 (1984) (pro se defendant has no right under *Faretta* to the "hybrid representation" of standby counsel). Only if a defendant makes a "substantial" showing that it will promote "justice and judicial efficiency" in his case

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6. Robbins apparently received two additional municipal court hearings relating to his dissatisfaction with counsel. J.A. 168.

does state law even grant the trial court the discretion to authorize advisory counsel. *Clark*, 3 Cal. 4th at 97. Otherwise, the motion is properly denied. *Id.* The denial of advisory counsel is not an abuse of discretion where it is based on the trial court's understanding and conscious exercise of its discretion. *Id.*

When counsel has been appointed, his client surrenders all but a few fundamental personal rights to his attorney, who has complete control of decisions relating to defense tactics and strategies. *People v. Hamilton*, 48 Cal. 3d 1142, 1163, 259 Cal. Rptr. 701 (Cal. 1989). A court should not appoint an attorney to defend an indigent defendant "and require of him that in so doing he surrender any of the substantial prerogatives traditionally or by statute attached to his office." *Id.*

In this case, Robbins made no showing that advisory counsel would promote justice and judicial efficiency. Indeed, to all indications, permitting Robbins to retain control of his case and direct an attorney's work would have defeated those ends. During the seven hearings relating to Robbins's request for other representation, self-representation and advisory representation, four different judges heard Robbins's arguments, understood their discretion and exercised it to deny Robbins advisory counsel. J.A. 95-119, 166-207, 208-43, 244-50, 251-67, 283-99, 300-25. The last of the four judges finally told Robbins:

You filed every possible motion that you could file to delay this matter . . . and keep the matter from being brought to trial. . . . I am not going to appoint advisory counsel. ¶ As I said, I will do everything I can to insure that you have a fair trial, but *I am not going to appoint advisory counsel. It's a matter of discretion with me. I exercise my discretion. The answer is no.*

J.A. 324 (emphasis added). When the record supports the inference that a pro se defendant is acting with

manipulative intent in his effort to obtain advisory counsel, the trial court may properly deny his request. *People v. Crandell*, 46 Cal. 3d 833, 863, 251 Cal. Rptr. 227 (Cal. 1988). The denial of advisory counsel was proper, because Robbins could not make the substantial showing that such an appointment would promote justice and judicial efficiency in his case, as was required under state law. In finding that Robbins had engaged in purposeful delay, the trial court determined that he was manipulating the court, a finding that separately justified the court's denial of advisory counsel. *Id.*; J.A. 324.

The denial of advisory counsel issue would have had no reasonable potential for success if raised on appeal. *Johnson*, 123 Cal. App. 3d at 109. It, too, was a frivolous claim. Even if that were not so, the denial of advisory counsel raise no federal constitutional issue and thus could not possibly have resulted in an unconstitutionally unfair and unreliable trial.

#### b. Primary Counsel

Concluding that the trial court failed even to consider whether Robbins was reasserting his right to primary counsel, the Ninth Circuit found that appellate counsel should have raised the issue. J.A. 88-90. A closer look at the record reveals that Robbins never withdrew his *Faretta* waiver at trial. The Ninth Circuit's conclusion is erroneous.

When a defendant exercises his right to be represented by professional counsel, it is counsel, not the client, who has charge of the case. *Hamilton*, 48 Cal. 3d at 1163. "By choosing professional representation, the accused surrenders all but a handful of 'fundamental' personal rights to counsel's complete control of defense strategies and tactics." *Id.* (emphasis in original).

On August 9th, Robbins asked for a lawyer's help. J.A. 320-22. After refusing him advisory counsel, the



court treated Robbins's request as one for primary counsel and offered to reappoint the public defender. J.A. 322-23. If Robbins had been interested in unequivocally surrendering his *Faretta* rights, he would have accepted the court's offer to reappoint the public defender. He did not. J.A. 323. Viewed in context, Robbins's own words reveal that any claim on appeal to having unequivocally withdrawn his *Faretta* waiver would have been utterly spurious. On this record, counsel on appeal properly recognized that the trial court's exercise of its discretion was unassailable, and the counsel issue was meritless.

### 3. No Showing of Deficient Performance or Prejudice

Counsel and the state appellate courts properly concluded that Robbins's case was wholly frivolous, because none of the legal issues were arguable on the merits. *Penson*, 488 U.S. at 81; *see also Neitzke v. Williams*, 490 U.S. 319, 325 (1989), quoting *Anders*, 386 U.S. at 744. There is no support in the record for the claims identified by the lower federal courts as arguable issues. Both of them are frivolous, and counsel was ethically bound not to raise frivolous issues on appeal. *Polk County v. Dodson*, 454 U.S. at 323; Rule 3-200, Cal. R. Prof. Conduct.

Under these circumstances, it is grossly unfair to California for the federal courts to presume prejudice and award Robbins the windfall of an automatic reversal, because "justice, though due to the accused, is due to the accuser also." *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934). Counsel's representation should not be presumed ineffective; it can and should be judged in accordance with *Strickland*. Since Robbins cannot demonstrate either deficient performance or an unfair result, the federal writ should have been denied, and this Court should reverse the judgment of the Ninth Circuit.

### III.

#### THE *TEAGUE* PROHIBITION AGAINST THE APPLICATION OF NEW RULES ON COLLATERAL REVIEW BARRED THE NINTH CIRCUIT FROM OVERTURNING *WENDE*

The Ninth Circuit's sudden revelation of *Wende*'s invalidity came on collateral review, in a case in which the panel slighted this Court's jurisprudence by deciding the *Teague* point last and without even pretending to survey the legal landscape to determine whether "[the] state court, at the time the conviction or sentence became final, would have acted objectively unreasonably by not extending the relief later sought in federal court." *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997). The circuit court misapplied *Teague*, because there were reasonable interpretations of *Anders*, counseling affirmance of Robbins's conviction, other than that which Robbins sought. Thus, the circuit's interpretation of the Constitution is not only wrong on the merits, but, even if right, is nevertheless a flagrant violation of this Court's consistent prohibitions against applying a new rule on collateral review. *Teague v. Lane*, 489 U.S. at 310.

As this Court has repeatedly recognized in a line of cases beginning with *Teague*, a state prisoner must demonstrate to the federal habeas court that he does not seek the retroactive benefit of a new rule of constitutional law, or even a settled rule applied in a novel setting. *O'Dell v. Netherland*, 521 U.S. at 156-57. When raised by the state, "the court *must* apply *Teague* before considering the merits of the claim." *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) (emphasis in original); *cf. Stewart v. LaGrand*, 119 S. Ct. 1018, 1020 (1999); *Lambrix v. Singletary*, 520 U.S. 518, 527 (1997). The *Teague* doctrine validates reasonable, good faith interpretations of precedent by



state courts. *O'Dell*, 521 U.S. at 156. There can be no real debate that *Wende* is a reasonable, good-faith interpretation of *Anders*.

Relief is barred by *Teague* unless, at the time Robbins's conviction became final, every reasonable state jurist would have felt compelled by existing precedent to conclude that the relief Robbins now seeks was required by the Constitution. *O'Dell*, 521 U.S. at 156. The new-rule principle is intended to assure that "gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered." *Sawyer v. Smith*, 497 U.S. at 234. It applies even if the initial state-court ruling proves contrary to later decisions. *Butler v. McKellar*, 494 U.S. 407, 414 (1990).

When a federal court extends the rationale of an existing rule, based on intervening changes in the law, it violates *Teague*. *Caspari v. Bohlen*, 510 U.S. at 395-97; *Butler v. McKellar*, 494 U.S. at 412-13. And, regardless of contrary authority, the very existence of valid precedents that support the state court's good faith, reasonable decisions works to preclude the retroactive application of new rules proscribed by *Teague*. *Id.*; see *Sawyer v. Smith*, 497 U.S. at 237-38 (1990); *Saffle v. Parks*, 494 U.S. 484, 491 (1990). If relief on a claim was not "dictated by precedent," in the sense that "no other interpretation was reasonable," the retroactive application of the rule violates *Teague v. Lane*. *Lambrix v. Singletary*, 520 U.S. at 538. (emphasis in original). Cases invoked at too great a level of generality provide the court with no meaningful guidance in resolving a *Teague* question. *Gilmore v. Taylor*, 508 U.S. 333, 344 (1993); accord *Gray v. Netherland*, 518 U.S. 152, 169 (1996); *Sawyer v. Smith*, 497 U.S. at 236.

There are three steps in the *Teague* analysis. First, the court must determine when the state conviction became final. Second, the court must survey the legal

landscape as it then existed to determine whether a state court considering the claim would have felt compelled by existing precedent to conclude that the rule sought by the state prisoner was required by the Constitution. Third, if the court determines that a petitioner seeks the benefit of a new rule, it must consider whether the rule falls within one of two "narrow exceptions to nonretroactivity." *Lambrix v. Singletary*, 520 U.S. at 527.

Robbins's conviction was final for purposes of this analysis on January 19, 1993. Rule 13, Rules of the Supreme Court of the United States; *Caspari v. Bohlen*, 510 U.S. at 380. California's no-merit brief procedure, its interpretation of *Anders*, had been evolving since 1967. *People v. Feggans*, 67 Cal. 2d 444. *Wende* itself had been in place since 1979. *Wende*, 25 Cal. 3d at 441-42.

As discussed in argument I above, after this Court invalidated California's no-merit-letter procedure, the California courts construed and applied the rule in *Anders*. *Anders v. California*, 386 U.S. at 741-42; *People v. Feggans*, 67 Cal. 2d at 447-48; see also *People v. Wende*, 25 Cal. 3d at 441-42. Research reveals no direct constitutional challenge to the holdings of *Feggans* and *Wende*. Consequently, reasonable California jurists have relied on *Feggans* and *Wende* as valid declarations of the *Anders* requirements for no-merit briefs in indigent criminal appeals.

Before the Ninth Circuit overturned the state court's reasonable expectations, it was obliged under *Teague* to conduct a survey of the legal landscape at the time Robbins's conviction became final. *O'Dell v. Netherland*, 521 U.S. at 160; *Lambrix v. Singletary*, 520 U.S. at 527. Such a survey would have revealed that not all state judges would have felt constitutionally compelled by existing precedent to reach the result Robbins now seeks.

Although the Ninth Circuit suggested that the analysis in *Penson v. Ohio* is controlling, J.A. 90, nothing in *Penson* mandates the result Robbins seeks. Indeed, it is notable

that in the seven years between *Penson* and *Robbins* it does not appear to have occurred to anyone that *Penson* invalidated California's *Wende* procedure. That is not surprising, because *Penson* does not require such an outcome.

In *Penson*, appellate counsel declined to file a brief in a case he believed meritless and instead filed a no-merit certification that resembled the letter brief disapproved in *Anders*. *Penson*, 488 U.S. at 80-81 and 81 n.3. Unlike California's *Wende* procedure, counsel's certification gave the Ohio court no basis for concluding he had performed his duty carefully. *Penson*, 488 U.S. at 81-82. In addition, again as distinct from California, the Ohio court erred in granting counsel's request to withdraw from the case before it independently reviewed the record. *Id.* at 82-83. However, the state court's pivotal error was in failing to provide *Penson* with counsel even after it had reversed one count and found "several arguable claims." *Id.* at 83. The error in failing to appoint counsel was held to be reversible per se, because the Ohio procedure had actually, *Gideon*-like, denied a merits appellant counsel on appeal. *Id.* at 85-86. In California, by way of contrast, an indigent appellant is never without counsel. Accordingly, reasonable California judges could have understood *Penson* to be factually inapplicable to the *Wende* procedure.

The Ninth Circuit's application of *Teague* was grudging and superficial. By leaving the *Teague* issue for last, the panel disregarded this Court's admonition that the new-rule issue "must apply *Teague* before considering the merits of the claim." *Caspari v. Bohlen*, 510 U.S. at 389 (emphasis in original). Nor did the panel take the trouble to survey the legal landscape as it existed in 1993.

If it had done so, it would have found that the legal landscape validated the reasonableness of California's interpretation of *Anders*. For example, in Oregon, an appointed attorney who concludes that there are no non-

frivolous issues to present "has no mandatory ethical obligation to withdraw from the representation[,]" so long as he himself does not knowingly advance an unwarranted claim. *State v. Balfour*, 311 Or. 434, 448, 814 P.2d 1069, 1078 (Or. 1991). Construing *Anders* in light of *Penson* and *McCoy*, the *Balfour* court concluded it would not further counsel's ability to discharge his ethical obligations to his client and the court if counsel were compelled to file an *Anders* brief "spell[ing] out the potentially limitless variety of 'arguably supportive' issues that counsel can fabricate or discern." *Balfour*, 814 P.2d at 1079. Appellate counsel in Oregon has no obligation to include argument in the brief. *Balfour*, 814 P.2d at 1080.

Arizona's no-merit procedure closely resembles California's, in that appointed counsel is expected to present a detailed statement of the case and facts, with references to the record, but without listing issues counsel has declined to advance. *State v. Clark*, 1999 Ariz. App. Lexis 11, 287 Ariz. Adv. Rep. 7, slip op. ¶¶ 2, 13-14 (Ariz. 1999). The *Clark* court declined to follow *Robbins*, finding the Arizona procedure superior to the Ninth Circuit's mechanical adherence to the narrowest reading of *Anders*, because it protects the interests identified by *Anders* without requiring counsel to violate their ethical duties to their clients. *Clark*, slip op. ¶¶ 31-32. The court noted that a detailed factual and procedural history with citations to the trial record permitted a court to be certain that counsel had actually reviewed the record and assisted the court in determining whether counsel was correct in concluding that the appeal was frivolous. *Id.* at ¶ 32. The *Clark* court also pointedly noted that

[the] continued survival of the various approaches [to *Anders*] suggests that the Supreme Court recognizes that there is more than one acceptable way to resolve the conflict between counsel's ethical obligations and an



indigent defendant's right to effective appellate representation.

*Id.* at ¶ 29. The *Clark* court concluded such variations were permissible, so long as the state procedure guaranteed indigent appellants their due process and equal protection rights to effective assistance of counsel. *Id.* The decision in *Clark* cited to Arizona's unfolding interpretation of *Anders* in *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (Ariz. 1984), and *State v. Scott*, 187 Ariz. 474, 478 n.4, 930 P.2d 551, 555 n.4 (Ariz. 1996). *Clark*, ¶¶ 30. Arizona's rule was thus part of the legal landscape at the time of Robbins's appeal. ¶ 1.

Like reasonable state-court judges acting in good faith, reasonable federal judges doing likewise could -- and did -- differ on whether California's *Wende* procedure meets the mandates of *Anders*. For example, in deciding *Marroquin v. Prunty*, No. CV 95-2477-KN, in which another federal habeas corpus petitioner contemporaneously raised a similar *Wende*-based claim of ineffective assistance of appellate counsel, Judge David Kenyon of the Central District of California did not feel compelled by *Anders* to overturn California's no-merit procedure and in an unpublished decision denied the writ. J.A. 54-56.

The fact that *Balfour*, *Clark* and *Marroquin* are part of the legal landscape is palpable proof that all reasonable jurists would not have felt compelled by existing precedent to rule in Robbins's favor on this claim at the time his conviction became final. *Caspari v. Bohlen*, 510 U.S. at 390; *Graham v. Collins*, 506 U.S. 461, 467-68 (1993). The Warden vigorously asserted this point below, and the Ninth Circuit simply ignored it. The panel's contrary holding relies on a rigid adherence to its own invalid interpretation of *Teague*'s "new rule" language.

Nor can it be successfully argued that this case comes within either of the two exceptions to the *Teague* bar. It has never even been suggested that the Ninth Circuit rule

should be applied retroactively because it decriminalizes a category of private conduct. *Lambrix v. Singletary*, 520 U.S. at 539. The second "exception is for watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the original proceeding." *Goeke v. Branch*, 514 U.S. at 120 (internal quotation marks omitted). Since a state has no obligation even to provide criminal defendants with appellate process, the procedural limits the state places on the right to appeal are not one of the small number of rules that can be described as "watershed." *Id.*

As this Court has made plain, a rule is new and therefore *Teague*-barred unless the *only* reasonable interpretation is that which the habeas petitioner seeks. *Lambrix v. Singletary*, 520 U.S. at 538. Under this articulation of the *Teague* standard, there can be no doubt that the proposed modification of *Wende* and *Feggans* is a new rule.



CONCLUSION

For the reasons outlined above, the Warden respectfully urges this Court to approve California's no-merit brief procedure as a constitutional interpretation of *Anders v. California*, to apply a *Strickland* test for prejudice to ineffective-assistance claims made against attorneys who file no-merit briefs, or to find, in the alternative, that any ruling which purported to upset California's long-established procedure on collateral review would be a new rule, in violation of *Teague v. Lane*.

Dated: April 22, 1999.

Respectfully submitted,

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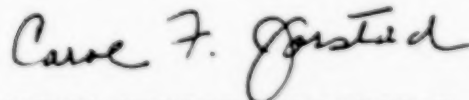
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(9)  
No. 98-1037

In The  
**Supreme Court of the United States**

—◆—  
GEORGE SMITH, WARDEN,

*Petitioner,*

v.

LEE ROBBINS,

*Respondent.*

—◆—  
**On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Ninth Circuit**

—◆—  
**BRIEF FOR THE RESPONDENT**

—◆—  
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## QUESTIONS PRESENTED

1. When a criminal defendant's direct appeal presents arguable issues, the defendant has a constitutional right, recognized since *Douglas v. California*, to a merits brief that argues one or more of those issues. Here, appointed counsel filed a conclusory no-merit brief that did not argue any issues. If Robbins' appeal presented arguable issues, did the no-merit brief violate his constitutional right to counsel on direct appeal?

2. Whether or not Robbins' appeal presented arguable issues, the question remains as it was in *Anders v. California* (where this Court identified no arguable issues) and in *Penson v. Ohio* (where arguable issues existed): "May a State appellate court refuse to provide counsel to brief and argue an indigent criminal defendant's first appeal as of right on the basis of a conclusory statement by the appointed attorney on appeal that the case has no merit and that he will file no brief?" *Penson v. Ohio*, 488 U.S. 75, 77 (1988) (quoting Brief for Petitioner in *Anders v. California*, O.T. 1966, No. 98, p. 2).

3. If counsel in a criminal case files a brief on direct appeal that does not argue or even refer to any legal issues at all, should prejudice be presumed due to the constructive abandonment of counsel?

4. Does the *Teague v. Lane* anti-retroactivity doctrine bar the lower courts from applying *Douglas* and *Anders* to this case, where Robbins' conviction became final decades after *Douglas* and *Anders* were decided?



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## STATUTORY PROVISIONS

California Rule of Court 228.1 states in pertinent part:

(a) [The conference] Before jury selection begins in criminal cases, the court shall conduct a conference with counsel to determine:

(1) a brief outline of the nature of the case, including a summary of the criminal charges;

(2) the names of persons counsel intend to call as witnesses at trial;

(3) the People's theory of culpability and the defendant's theories;

(4) the procedures for deciding requests for excuse for hardship and challenges for cause; and

(5) the areas of inquiry and specific questions to be asked by the court and, as permitted by the court, by counsel and any time limits on counsel's examination.

Cal. Rule of Court 228 (effective June 6, 1990).

California Penal Code Section 1260 states:

The court may reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense or the punishment imposed, and may set aside, affirm or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances.

Cal. Penal Code § 1260 (West 1982).

## STATEMENT OF THE CASE

### I. PROCEDURAL BACKGROUND

Lee Robbins was an indigent, incarcerated defendant charged with first degree murder. His trial was flawed in ways almost too numerous to count. His public defender did



not want to file even a discovery motion on his behalf. When the trial court refused to appoint another attorney to represent him, Robbins saw no alternative but to defend himself. He was given only \$500 to locate witnesses and investigate the crime. The trial court neither heard his motions nor served his trial subpoenas, although it had promised to do so. After he filed a written motion challenging the state of the jail law library, the court itself agreed that the law library was inadequate. But the court refused to allow Robbins to withdraw his waiver of counsel and refused to appoint advisory counsel to assist him, saying that it would never ask an attorney to "play second fiddle" to a client. Moments before jury selection began, the court denied Robbins crucial discovery that it had earlier ordered produced.

Prevented from meaningfully preparing for trial, Robbins was left untrained and unaided, indigent and incarcerated, facing a prison sentence of twenty-seven years to life. Once his trial began, he failed to excuse potential jurors who would probably favor the prosecution, ineffectively cross-examined witnesses, did not call a single witness in his own defense (because the court had not had his trial subpoenas served), and declined a manslaughter instruction. All in all, the adversarial process failed. Nevertheless, the jury rejected the prosecutor's call to convict Robbins of first-degree murder, convicting him instead of second-degree murder and grand theft of an automobile.

On appeal, Robbins' appointed lawyer filed a conclusory no-merit brief that neither argued nor referred to any legal issues at all. He also failed to obtain and provide the appellate court with the full trial court record, leaving the court (and himself) without access to transcripts and filings that supported viable appellate claims. When Robbins filed *pro se* requests to augment the record, appointed counsel did nothing to support him, and the requests were denied. Robbins' appeal was then denied on the merits by an appellate court that lacked the benefit both of the full record and of an advocate's brief.

On habeas review, the district court found that Robbins' appointed appellate counsel had failed to argue at least two arguable issues. It therefore found that Robbins had been denied his constitutional right to counsel on appeal. The Ninth Circuit affirmed.

## II. FACTUAL BACKGROUND

### A. Introduction.

On December 31, 1988, Douglas Spaulding died in a gun battle. SER 275, 319.<sup>1</sup> He had fired no fewer than five shots, and at least five shots had been fired at him. SER 264, 275. Robbins was charged with first degree murder with a gun use allegation, as well as with grand theft of an automobile. CT 106-07. He faced a mandatory sentence of twenty-five years to life on the murder charge alone. JA 222. There were no eyewitnesses to the shooting, and the prosecution's evidence was both conflicting and circumstantial. *See, e.g., infra* note 5.

### B. State Court Pre-Trial Proceedings.

Robbins repeatedly sought to replace his public defender. During a series of hearings conducted pursuant to *People v. Marsden*, 2 Cal. 3d 118, 84 Cal. Rptr. 156 (1970) (setting forth procedure for replacing appointed counsel), Robbins told the trial court that his attorney refused to give him documents related to the case, refused to file a discovery motion on his behalf, repeatedly told him that he was "guilty until I prove myself innocent," and refused to act on his behalf because he believed that Robbins had no defense. JA 99-103, 169-70; SER 4. The trial court denied each of Robbins' requests for new counsel. JA 111, 197-98; SER 11. At the conclusion of the final *Marsden* hearing, Robbins told the court that, if it would not appoint substitute counsel, he

<sup>1</sup> Each abbreviated citation to the record is explained in the Table of Record Citations, *supra* at xii.

had "no choice" but to represent himself. JA 190, 198. He waived his right to counsel two days later. *Faretta v. California*, 422 U.S. 806 (1975). JA 217-27.

A few weeks after his *Faretta* waiver, Robbins filed a written motion objecting to the state of the jail law library: "The law library was found to be inadequate back in 1975 and hasn't been updated since. . . . An accused who cannot research a charge against him cannot present his best defense because he has no way of discovering what possible defenses exist." App. 7, 9. The court agreed with Robbins about the state of the law library but refused to correct the problem:

[I]f you are looking up law, you are not going to [be] able to find it because somebody has torn it out before you got there. And you are going to be asking me for time or books or something else, and I am not going to be inclined to grant it.

JA 255-57, 259-60.

Nor did Robbins' troubles end there. A central factual issue in the case was whether a particular gun was the murder weapon. SER 296-323. The court granted Robbins \$500 for an investigator; in a written motion, Robbins asked for additional funds for an investigator and for a forensics expert, offering to provide the court with more detailed support *in camera* if necessary. JA 263; App. 30-31. The court summarily denied the motion without giving Robbins the opportunity to make a further showing. JA 284-85. Robbins was thus unable to challenge the prosecutor's characterization of the forensic evidence against him.

Preparing his defense from his jail cell and facing a possible life sentence, Robbins was without legal assistance, without a functioning law library, without a forensics expert, and without more than \$500 to investigate the case. Throughout the pre-trial proceedings, his attempts to represent himself were a failure. Increasingly desperate for help, he several times sought the appointment of advisory counsel. JA 247-48;

App. 28-32.<sup>2</sup> The court denied all of his requests – even though it told Robbins in the course of one such denial that his pretrial motions were "garbage." JA 320-21; *see also* JA 255, 321-24 (denying requests). Although the court purported to exercise its discretion in denying Robbins' requests for advisory counsel, JA 324, its comments reveal its true policy: "I am not going to ask an experienced attorney who is trained in law school and who is a criminal lawyer to sit there and play second fiddle and have you call the shots. . . ." JA 321.

Some of Robbins' requests for substitute counsel did not clearly distinguish substitute from advisory counsel, but the court made no attempt to explore the requests. It simply denied them all. Indeed, it refused even to accept a habeas petition in which Robbins asked "that an attorney be appointed to represent me." JA 276-77, 286-87; App. 32. One week before trial, when Robbins again requested "assistance of counsel to help me present my defense" and indicated a new possible conflict with the public defender's office, the court failed to explore the nature of the new conflict and did not even try to clarify whether Robbins wanted advisory or substitute counsel. Instead, it denied the request. JA 320-24.

Without tools, training, advisory counsel or substitute counsel, Robbins tried to press ahead with his defense. But the adversarial system continued to fail him. The trial court never allowed him to argue his motion to dismiss, in which he contended that the state's forensic evidence contained numerous inconsistencies and that the state had lost, destroyed, or tampered with certain material evidence. CT 163-73.<sup>3</sup> The court refused even to accept a habeas petition in

<sup>2</sup> The Warden characterizes Robbins as manipulative, but a more accurate reading of the record is that he was an unfailingly polite and non-manipulative defendant who found himself in an impossible situation.

<sup>3</sup> The minute orders from the hearings immediately following the filing of the motion (no transcripts were ever prepared) do not indicate that the motion was ever heard. CT 174-76. The court evidently (but



which Robbins asked for counsel. JA 272, 286-87. Moments before jury selection began, the court refused to order the prosecutor to produce a record of the decedent's arrests "for specific acts of aggression," SER 68, 124-25, even though the prosecutor had agreed earlier that Robbins was entitled to it (and to everything else in his discovery motion) and the court itself had declared the matter resolved in light of the prosecutor's promise to produce it. JA 126; App. 26-27.<sup>4</sup>

The system failed in other ways as well. The court agreed to have Robbins' trial subpoenas served, but it refused to attempt service on Deputy Barry Jones, one of the two principal investigating officers. JA 291, 294-95; SER 226. The court did not challenge the materiality of Jones' testimony or express doubt that he could provide evidence favorable to Robbins, but announced that Jones, who had been employed by the sheriff's department as recently as seven months earlier, CT 89, no longer worked there and could not be located. JA 294-95. The record does not show that the court made any effort to discover the whereabouts of the recently retired deputy.

The court also refused to subpoena the officer who had retrieved fingerprints at the crime scene, stating, "I was inquiring of the prosecutor as to the officers - there is duplication. . . . The print man is one of the people that the prosecutor is definitely bringing in. The one who handled the latents and prints is going to be here." JA 295-97. Evidently relying on the court's representation, Robbins did not attempt further to establish the materiality of the witness or attempt further to subpoena him. At trial, however, the prosecutor did not call "the print man."

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mistakenly) believed that another judge had decided the motion. JA 285-86.

<sup>4</sup> The record would likely have shown, at a minimum, that the decedent had been arrested a few months before his death for beating his wife. SER 136-37, 145-46. The decedent had also threatened to kill Robbins and had shot at Robbins' van on the freeway. CT 96-97.

Another aspect of the court's judicial function appears to have broken down. The court's admission that it "was inquiring of the prosecutor" about Robbins' trial subpoenas indicates a prior communication between the prosecutor and the court about the prosecutor's witnesses. JA 297. Because nothing in the record up to that point identified the prosecutor's witnesses, Robbins' federal habeas petition argued that the prosecutor and the court had had an improper *ex parte* contact. Hab. Pet. at 64-65. The Warden responded that a "fair interpretation" of the court's comments was that the prosecutor had made an unreported response during the hearing. Return at 46-47. But this explanation is implausible: The prosecutor was not present during this portion of the hearing. JA 294.

### C. State Court Trial And Sentencing.

Robbins went to trial without meaningful investigation, without representation or advice of counsel, and without any of the witnesses he had subpoenaed. The results were predictable. Robbins declined to hold the prosecutor to an earlier agreement to sever a charge of grand theft of an automobile, SER 72, did not exercise any challenges during *voir dire* (possibly because the court failed to hold the pre-*voir dire* conference required by California Rule of Court 228.1), SER 85-116, did not make an opening statement, SER 130, and never raised any evidentiary objections. He incompetently cross-examined the state's witnesses, and he allowed hearsay and other non-responsive testimony to be admitted. *See, e.g.*, SER 144-45, 221-23.

Informed by the bailiff in a whisper that none of his own witnesses was available, Robbins did not call a single witness in his defense. SER 344, 440. His closing argument was repeatedly hamstrung by the prosecutor's objections, and he never argued the presumption of innocence or the prosecutor's high burden of proof. SER 359-65. He declined a manslaughter instruction, SER 336-37, and he did not object when the court twice gave a reasonable doubt instruction that used



"moral certainty" and "moral evidence" language. SER 80, 385-86.

As a result, Robbins was tried not only for murder but for fleeing the state afterwards in a stolen truck. SER 390-91. He was judged by a jury that included the father of a police officer who had often worked with the prosecutor, SER 85-89, a woman who had been robbed at gunpoint and three of whose family members had been victims of car theft, SER 98, 102, and a woman who had witnessed an armed robbery and whose son had been beaten so severely during another robbery that his skull was fractured, SER 99-101.

But despite the lack of adversarial testing of the state's evidence, the case was a close one. Although the evidence stage of the trial lasted less than five hours, SER 129, 178-79, 281-82, 333, 344, the jury deliberated over the course of two days, SER 396-97, 400-01, asked for a read-back of certain testimony, SER 397, and posed certain questions of the court, SER 398-400. It rejected the prosecutor's request for a verdict of first degree murder, convicting Robbins instead of second degree murder with a gun use allegation and grand theft of an automobile. SER 358-59, 401-04. Robbins was sentenced to prison for a term of seventeen years to life. SER 409.

#### D. State Court Direct Appeal.

Robbins filed a notice of appeal and requested that "all pre-trial and trial proceedings" be included in the record. CT 253-54. David Goodwin was appointed as his appellate counsel. App. 24-25. Before Goodwin filed his no-merit brief, Robbins twice asked the court to augment the appellate record with motions and transcripts of proceedings that were not included in the clerk's and reporter's transcripts or in Goodwin's own motion to augment the record. JA 326-31. His requests were denied. *See, e.g.*, JA 331.

Goodwin filed a no-merit brief on or about October 1, 1991. JA 26-37. The first section was a one and one-half page procedural history. It briefly mentioned the denial of two of

Robbins' four *Marsden* motions (erroneously giving March 1 as the date of one of the denials, JA 162-63), but it did not mention, let alone discuss, any of the other documents or pre-trial proceedings described on pages 3-8 above. Goodwin's only citations to the record were to minute orders and other similarly short documents. He did not cite the transcript of a single pre-trial hearing or any of Robbins' written motions. The second section of his brief, a six-page factual history, purported to be a summary of the trial proceedings. It omitted many material facts, and the facts that it included were largely presented in a way unfavorable to Robbins.<sup>5</sup> The third section, captioned "Argument," contained no argument. It did not so much as hint at a potential issue. The fourth section consisted of a one-page declaration in which Goodwin stated that he had (1) "reviewed the entire record on appeal," (2) "examined the superior court file," and (3) "discussed appellant's case with trial counsel." JA 36.<sup>6</sup>

But Goodwin had not reviewed the entire record. He never looked at the transcripts of many crucial pretrial proceedings. Because he did not cause them to be included in the record on appeal, the state court of appeal did not review

<sup>5</sup> For example, Goodwin: (1) failed to describe the testimony of two prosecution witnesses who testified that Robbins remained with them on the night of the crime until after the hour at which the state contended the shooting had occurred, SER 133, 140-41, 290-92, 325; and (2) failed to recount the testimony of a prosecution witness who described Robbins as having worn clothing on the night of the crime that did not match the clothing described by a witness who the state contended had seen Robbins near the crime scene when the crime allegedly occurred. SER 158, 161, 293.

<sup>6</sup> The Warden's petition for writ of certiorari accurately reports that Goodwin's declaration stated that he "discussed the case with trial counsel." Cert. Pet. 3, 13. Perhaps realizing that this statement asserts an impossibility because Robbins represented himself at trial, the Warden now claims instead that Goodwin "averred that he had spoken to the attorney who had represented Robbins until Robbins waived counsel." WB 3, 24. The record does not support this assertion.

these proceedings either. These proceedings included (1) all proceedings held prior to November 28, 1989, including a *Marsden* hearing held on October 19, 1989, *see* JA 162, App. 2, SER 2; (2) a hearing held on April 16, 1990, at which Robbins' request for advisory counsel was denied, JA 244-50; (3) a hearing held on July 13, 1990, at which Robbins' request for advisory or other counsel was denied and the court refused to serve certain of Robbins' trial subpoenas, JA 283-99; App. 28-32; (4) a hearing held on August 9, 1990, at which the court stated that Robbins' motions were "garbage" but refused to appoint advisory or other counsel, JA 300-25; and (5) the prosecutor's opening statement, SER 130. Robbins attached some of these transcribed proceedings, which he later caused to be prepared, as exhibits to his federal habeas petition. Hab. Pet., Ex. E. Some of these proceedings still have not been transcribed. In addition, Goodwin did not review Robbins' habeas petition, which the trial court had refused to accept. JA 272-82, 286-87; App. 32-33. He also failed to cause important documents from the superior court file to be included in the record on appeal. *See* App. 5-23.

On October 28, 1991, the appellate court issued two orders. One allowed Robbins thirty days to supplement Goodwin's no-merit brief. JA 333-34; App. 33. The other denied Robbins' second motion to augment the record, stating that augmentation was Goodwin's responsibility. JA 331-32. Goodwin did nothing.

Robbins subsequently filed a *pro se* supplement to Goodwin's brief that raised none of the arguable issues identified at pages 18-23 below. Supp. Ret., Ex. 13. On December 12, 1991, the state court of appeal affirmed Robbins' conviction, noting – incorrectly, since it had twice denied Robbins' request to augment the record – that it had "examined the entire record." Hab. Pet. Ex. B-4.

### **E. Federal Habeas Proceedings.**

After exhausting his state court remedies, Robbins filed a *pro se* federal habeas petition in which he claimed, among

other things, that Goodwin's no-merit brief violated this Court's decision in *Anders v. California*, 386 U.S. 738 (1967). Hab. Pet. 82-88.

During the proceedings before the district court, the Warden filed a declaration in which Goodwin stated (1) that he had "attempted to consider" not all, but only "most" of the issues that Robbins had raised with him; (2) that he had not filed an advocate's brief because he had not found the issues that he considered to be "meritorious;" and (3) that he had "consulted" with the California Appellate Project ("CAP") and received "their permission to file a *Wende* brief [*People v. Wende*, 25 Cal. 3d 436, 158 Cal. Rptr. 839 (1979)]." JA 43. Goodwin's declaration, filed at a time when the *Anders* issue was front and center, demonstrates that his standard for including an issue in an advocate's brief was not whether it was "arguable," but whether it was "meritorious." In addition, although Goodwin stated that he had consulted with CAP, nothing in the record suggests that any attorney at CAP reviewed even the partial record submitted to the court of appeal, let alone the entire record of the proceedings below.

### **SUMMARY OF ARGUMENT**

This case and the lower courts' decisions are based on the right to counsel established in *Douglas v. California*, 372 U.S. 353 (1963). *Douglas* holds that the right to counsel on the first appeal of right requires counsel to file an advocate's argumentative brief (a "merits brief") in a non-frivolous criminal appeal. Because Robbins' state appeal presented several substantial appellate issues, the filing of a conclusory no-merit brief violated the right to counsel established in *Douglas*.

*Anders v. California*, 386 U.S. 738 (1967), reaffirms the right to a merits brief but also recognizes a narrow exception to that right. In apparently frivolous appeals, *Anders* permits counsel to file an "*Anders* brief," which identifies (but does not argue) legal issues that a reasonably competent lawyer would consider in assessing the merits of the appeal. *Anders*,



386 U.S. at 744-45; *Nickols v. Gagnon*, 454 F.2d 467, 471 (7th Cir. 1971) (Stevens, J.). In the absence of a merits brief, an *Anders* brief provides the reviewing appellate court with the minimum-required basis for ensuring that appointed counsel's failure to identify arguable issues is based on a diligent review of the record and applicable law, and that counsel's no-merit conclusion is correct. *McCoy v. Wisconsin*, 486 U.S. 429, 442 (1988). Thus, even if Robbins' appeal had presented no arguable issues, the filing of a conclusory no-merit brief would have been unconstitutional under *Anders*.

This Court need not address *Anders* here, because Robbins had the right to a merits brief, not just an *Anders* brief. Should the Court consider *Anders*, however, it is important to recognize that the *Anders* procedure works. Contrary to the Warden's and his *amici's* assertions, there is nothing "impossible" or unethical about filing an *Anders* brief. First, in writing an *Anders* brief, counsel does not "argue" frivolous issues. *Anders* requires only that counsel who believes that no non-frivolous issues exist identify (not argue) legal issues that competent counsel would consider in assessing the appeal. Second, *Anders* does not require counsel to argue against his or her client. It requires identification of legal issues presented by the appeal, not an explanation of counsel's reasons for concluding that the identified issues are not arguable. Finally, filing an *Anders* brief is no more or less difficult than filing a merits brief. Appointed counsel, who has a duty to examine the record and consider all potential claims, is well positioned to file an *Anders* brief that identifies the issues that counsel considered before concluding that the issues were not arguable.

The Warden argues that (1) California has a different procedure, which does not require an *Anders* brief, and (2) California's different procedure is constitutional. The Warden is wrong on both points. First, the California Supreme Court has made clear that its procedure does not deviate from *Douglas* or *Anders*. *In re Sade C.*, 13 Cal. 4th 952, 55 Cal. Rptr. 2d 771 (1996). A merits brief is required whenever the

appeal presents arguable issues, and an *Anders* brief identifying legal issues is required when there are no arguable issues. A conclusory no-merit brief – identifying no legal issues at all – is not authorized under California law. *Id.* at 977-81, 55 Cal. Rptr. 2d at 785-88.

Second, even if California had adopted a procedure permitting counsel not to file a merits or *Anders* brief, that procedure would be unconstitutional, just as it was in 1963 and 1967 when *Douglas* and *Anders* were decided. Indeed, the Warden's argument here is virtually identical to the state's argument in *Anders*. The Warden adds only one new feature: He argues that the *Anders* protections are not necessary because appointed counsel remains *formally* present at all times during the appeal, even though the formally present lawyer does nothing to assist the appellate court in its review of the cold record. What the Warden fails to recognize is that counsel in *Anders* also was formally present at all times and that counsel's formal presence made no difference – nor should it have, given the merely nominal nature of that continued representation. *Id.* at 980, 55 Cal. Rptr. 2d at 787.

The Warden effectively asks this Court to abandon *Douglas* and *Anders* by denying habeas relief absent a showing that the filing of a merits or *Anders* brief would have made a difference to the state appellate court ruling on issues of both state law and federal constitutional law. But this Court has previously recognized that, when counsel abandons the client by failing to file a merits brief in an appeal of arguable merit, prejudice must be presumed. *Penson v. Ohio*, 488 U.S. 75, 86-87 (1988).

The same rule of presumed prejudice should apply when counsel fails to file an *Anders* brief identifying the issues presented by the case. This bright-line rule not only defines the right to counsel on appeal, but is mandated by principles of efficiency, comity, and federalism. These principles would be offended if a federal court were compelled to intrude on state sovereignty by deciding the merits of state law and constitutional issues that the state appellate court had not



previously considered on direct review. Further, because there is no general right to counsel on habeas review, a failure to file either an *Anders* brief or a merits brief in the state proceeding will often leave the federal court without an adequate basis for assessing the merits of the appeal – just as the state appellate court was unable to assess the strength of the appeal without a constitutionally adequate merits or *Anders* brief.

Finally, the Warden argues that the non-retroactivity rule of *Teague v. Lane*, 489 U.S. 288 (1989), bars consideration of this violation of *Douglas* and *Anders*. The Warden contends that the long-established *Douglas-Anders* rules are “new” because this Court has not previously applied them to what the Warden argues is California’s procedure. By that theory, virtually every application of an established rule of constitutional criminal procedure would be a new rule. In any case, applying *Douglas* and *Anders* does not conflict with the state court’s interpretation of federal constitutional law. California’s court-made procedure, as interpreted by its own Supreme Court, requires the filing of a merits or *Anders* brief under exactly the same conditions as *Douglas* and *Anders*. *Sade C.*, 13 Cal. 4th at 979-81; 55 Cal. Rptr. 2d at 786-88.

## ARGUMENT

### I. ROBBINS’ RIGHT TO COUNSEL WAS VIOLATED BY COUNSEL’S FAILURE TO BRIEF ANY OF THE ARGUABLE ISSUES PRESENTED BY THE APPEAL.

The adversary process on Robbins’ appeal broke down completely. These were no mere technical violations. Goodwin failed to review the entire record, failed to present critical portions of the record to the state appellate court, and, most significantly, failed to argue even one of the many legal issues that existed. In sum, Goodwin provided absolutely no assistance to the appellate court, which was forced to resolve the merits of Robbins’ appeal based only on its own unguided review of the barren record. No matter how diligent it may be,

an appellate court forced to decide the merits of an appeal without any meaningful assistance from defense counsel is likely to miss potentially winning points – rendering the court’s judgment highly dubious. That is what happened here.

### A. The Right To Counsel Mandates The Filing Of A Merits Brief Whenever Arguable Issues Exist.

A defendant in a criminal case has a constitutional right to an advocate on appeal; the most basic responsibility of that lawyer is to file a brief on the merits (“merits brief”) that argues non-frivolous issues. The right to such counsel was first recognized in *Douglas v. California*, 372 U.S. 353 (1963). This Court in *Douglas* rejected as constitutionally inadequate a state procedure that conditioned an indigent defendant’s right to appointed counsel upon the appellate court’s determination that counsel would be “helpful.” *Id.* at 355.

Under that California procedure, the appellate court reviewed the “barren record” without the benefit of written briefs or oral argument by defense counsel. *Id.* at 356. By that process, indigent defendants were subject to a prejudging of the merits on appeal that (1) denied them the benefit of an advocate, and (2) forced appellate courts to review the cold record without the aid of a merits brief. Indigent defendants thereby faced the risk of losing on appeal in cases of hidden or undiscovered merit. *Id.* at 357-58. This Court recognized that, because counsel’s assistance on appeal is essential to the adversary process, California’s denial of such advocacy turned the indigent defendant’s appeal into nothing more than a “meaningless ritual.” *Id.* at 358.

This Court has consistently reaffirmed the right to counsel on the first appeal as of right. This is a substantive, not a prophylactic, right. It is mandated by both the principle of substantial equality of treatment for indigent and non-indigent defendants and the principle of due process of law. *Evitts v.*

*Lucey*, 469 U.S. 387, 394-95 (1985). Due process is implicated because our criminal procedure is founded upon the adversary system. *Id.* at 394.

The right to counsel on the first appeal as of right is "among the most fundamental of rights" because it is only "through counsel that all other rights of the accused are protected." *Penson v. Ohio*, 488 U.S. 75, 84-85 (1988). The defendant needs and is entitled to a forceful advocate on appeal; anything less fails to protect the integrity of the adversarial appellate process. *Id.* at 85. A criminal defendant on appeal who is forced to function without an advocate " – like an unrepresented defendant at trial – is unable to protect the vital interests at stake." *Id.* (quoting *Evitts*, 469 U.S. at 396).

To protect the defendant's interests on appeal, the general rule is that counsel must file an advocate's brief, the *sine qua non* of appellate representation. *Douglas*, 372 U.S. at 357-58. There can be no meaningful appellate representation without a constitutionally adequate brief. *Penson*, 488 U.S. at 81.

There are two different types of briefs. A "merits brief" is an argumentative brief, the type of adversarial brief required by *Douglas*. It is distinguished from an "*Anders* brief," which identifies issues but does not argue them. *Anders v. California*, 386 U.S. 738, 744 (1967). A merits brief is *required* in non-frivolous appeals, whereas an *Anders* brief is *permitted* in "frivolous" appeals – appeals that "lack[ ] any basis in law or fact." *McCoy v. Wisconsin*, 486 U.S. 429, 438 n.10 (1988).

This Court has recognized that the promise of *Douglas* would be empty if appointed counsel were excused from filing a merits brief in a non-frivolous appeal. *Penson*, 488 U.S. at 83. *Douglas*, *Anders*, *McCoy*, and *Penson* therefore require that the appellate court "appoint counsel to pursue the appeal and direct that counsel to prepare an advocate's brief before deciding the merits" in all cases where arguable issues exist. *McCoy*, 486 U.S. at 444.

## **B. Robbins Was Entitled To A Merits Brief Because His Appeal Raised Several Arguable Issues.**

*Douglas* and *Anders* hold that a merits brief is required whenever an appeal presents arguable issues. Robbins' state court appeal presented many such issues, but Goodwin raised none of them. That failure violated Robbins' right to counsel.

The Warden now contends that the two arguable issues identified by the district court and Ninth Circuit are not arguable. WB 35-42. Yet the Warden did not contest these findings in his petition; indeed, he advised this Court that, although he had contested the existence of arguable issues below, the matter is "not relevant to the questions presented." Reply to Opp. to Cert. Pet. at 5 n.3. This Court should therefore presume that arguable issues exist. *Taylor v. Free-land & Kronz*, 503 U.S. 638, 645 (1992) (holding that issues not raised in petition are not properly addressed on the merits).

Moreover, both the district court and the Ninth Circuit emphasized that they had not attempted to identify *all* of the arguable issues, because the existence of even one arguable issue required that Robbins be granted a new state appeal. JA 49, 89 n.3. Although the space limitations of this brief do not permit anything more than a summary analysis, and the relevant inquiry is only whether an issue is non-frivolous, the following issues – none of which Goodwin even mentioned in his brief – are at least arguable under California law, federal law, or both.<sup>7</sup>

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<sup>7</sup> The facts supporting these issues are summarized at pages 3-8 above. This section relies only on cases available to Goodwin at the time he filed his no-merit brief. Some of these issues are stronger than others; counsel was not required to pursue all of them in a merits brief. *Jones v. Barnes*, 463 U.S. 745 (1983). But even if counsel believed that none of these issues belonged in a merits brief, he should have referred to them in an *Anders* brief.



### 1. Pre-trial tools for a defense.

When Robbins concluded that his appointed trial counsel was not zealously representing his interests and that he would have to represent himself, he arguably had a right to a "meaningful opportunity to prepare his defense," including, "at a minimum, . . . some access to materials and witnesses." *Milton v. Morris*, 767 F.2d 1443, 1445-46 (9th Cir. 1985) (citing *Faretta v. California*, 422 U.S. 806 (1975)). But Robbins was consistently denied the tools he needed to prepare a defense. Under California law, the issues below must be considered both individually and cumulatively. *People v. Buffum*, 40 Cal. 2d 709, 726, 256 P.2d 317, 326 (1953).

#### a. Failure to provide funds for a forensic expert and an investigator.

Both state law and federal constitutional law gave Robbins the right to court-funded investigative and expert services. Although a defendant must make a showing of need for such services, the court must view a pre-trial motion for such assistance liberally. *Corenevsky v. Superior Court*, 36 Cal. 3d 307, 319-20, 204 Cal. Rptr. 165, 171-72 (1984); see also *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (recognizing that due process requires that indigent defendant be given "access to the raw materials integral to the building of an effective defense"). In some cases, the need for such services may be "readily apparent absent some explanation." *People v. Worthy*, 109 Cal. App. 3d 514, 522, 167 Cal. Rptr. 402, 407 (1980). This was such a case. Not only had Robbins filed a pre-trial motion alleging that the state had mishandled the forensic evidence, but a central issue in the case was whether a particular gun was the murder weapon. When the court denied Robbins' request for a "forensics expert" and funds for an investigator – without even attempting to explore the basis for Robbins' request or accepting Robbins' offer to make an additional showing *in camera* – it arguably deprived him of his right to necessary ancillary services.

### b. Failure to provide an adequate jail law library.

Six years before Goodwin filed his brief, the Ninth Circuit recognized that the inadequacy of a jail law library could give rise to a *Faretta* violation. *Milton*, 767 F.2d at 1446; see also *Taylor v. List*, 880 F.2d 1040, 1047 (9th Cir. 1989). The Warden is incorrect in asserting that Robbins failed to preserve this issue for appeal. WB 37. Robbins expressly complained about the inadequacy of the law library in a written motion that Goodwin inexplicably and improperly failed to include in the record on appeal. App. 7-9. Further, the trial judge's comments about the state of the law library were not merely "hyperbolic." WB 37. The court and Robbins agreed that the law library was inadequate.

The right of access to a law library is arguably implicit in the notion of self-representation. *Milton*, 767 F.2d at 1446; *McKaskle v. Wiggins*, 465 U.S. 168, 174 (1984) ("defendant's right to self-representation plainly encompasses certain specific rights to have his voice heard"). Robbins was therefore arguably not required to show prejudice from the denial of an adequate law library. *United States v. Smith*, 780 F.2d 810, 811 (9th Cir. 1986). Moreover, even if the state appellate court believed that a showing of prejudice was required and was not made, it had the option of remanding the case to the trial court for such a determination. Cal. Penal Code § 1260 (West 1982).

#### c. Failure to provide advisory counsel.

Under California law, the denial of advisory counsel may be an abuse of discretion, which is reversible *per se*. *People v. Bigelow*, 37 Cal. 3d 731, 742-46, 209 Cal. Rptr. 328, 334-36 (1984). The *Bigelow* court considered four factors in evaluating the defendant's request for advisory counsel: (1) the seriousness of the charges, (2) the factual and legal complexity of the case, (3) the level of the defendant's general education, and (4) the defendant's legal knowledge and experience. *Id.* The court must engage "in a reasoned exercise of



judgment based on an examination of the particular circumstances" of each case. *People v. Crandell*, 46 Cal. 3d 833, 862, 251 Cal. Rptr. 227, 240-41 (1988). Here, each of the four *Bigelow* factors arguably weighed in favor of appointment of advisory counsel. The charge of first degree murder was obviously "serious;" the forensic issues were complex; Robbins had minimal legal knowledge or experience; and, as the trial court told Robbins, his briefs were "garbage" and the law library was inadequate. The court's failure to consider the four factors – let alone its failure to appoint advisory counsel – arguably was an abuse of discretion.

**d. Failure to permit Robbins to withdraw his *Faretta* waiver.**

Under California law, a trial court must exercise "meaningful discretion" in considering a request to withdraw a *Faretta* waiver. *People v. Elliott*, 70 Cal. App. 3d 984, 993, 139 Cal. Rptr. 205, 211 (1977). The Warden argues that Robbins would have accepted the reappointment of the public defender had he truly wished to withdraw his *Faretta* waiver. WB 42. But this argument ignores the court's failure to explore the basis of the alleged new conflict. *Wood v. Georgia*, 450 U.S. 261, 272 (1981) (holding that "court has duty to inquire further" where "possibility of a conflict" is "sufficiently apparent") (footnote omitted); *Smith v. Lockhart*, 923 F.2d 1314, 1320-21 (8th Cir. 1991); *United States v. Hurt*, 543 F.2d 162, 166-68 (D.C. Cir. 1976). Furthermore, the court did not ask Robbins, in light of his ambiguous statements, whether he wished to continue to represent himself. Instead, the court simply reiterated that Robbins had chosen to represent himself and implied that, having made his choice, he was not permitted to rescind it.<sup>8</sup>

<sup>8</sup> The trial court also erred in refusing to accept – let alone to hear – the habeas petition that Robbins sought to file in the trial court, in which he asked for counsel. *Griggs v. Superior Court*, 16 Cal. 3d 341, 347, 128 Cal.

**e. Failure to provide the decedent's arrest record.**

When Robbins originally requested the decedent's arrest record, the prosecutor properly agreed that it was material evidence. Robbins specifically cited *Engstrom v. Superior Court*, 20 Cal. App. 3d 240, 245, 97 Cal. Rptr. 484, 487 (1971), in his discovery motion, thereby putting the state on notice of a possible defense of self-defense. The prosecution was thus required to disclose acts of aggression on the part of the decedent, so that Robbins could use the evidence to demonstrate self-defense or to show mitigating circumstances that might reduce the charge. The prosecutor's later failure to produce what he had promised arguably caused Robbins to "abandon lines of independent investigation, defenses, or trial strategies that [he] otherwise would have pursued." *United States v. Bagley*, 473 U.S. 667, 682 (1985). Although the theory behind Robbins' cross-examinations and closing argument was that he had not shot the decedent, he did not present evidence inconsistent with self-defense: He presented no defense at all. The failure to provide the decedent's arrest record was error. *People v. Coyer*, 142 Cal. App. 3d 839, 191 Cal. Rptr. 376 (1983). Robbins was entitled to remand so that the trial court could examine the decedent's arrest record and order a new trial if warranted. Cal. Penal Code § 1260; *Coyer*, 142 Cal. App. 3d at 844, 191 Cal. Rptr. at 380.

**f. Failure to serve Robbins' trial subpoenas.**

Robbins had a right to compel witnesses in his defense. *Washington v. Texas*, 588 U.S. 14 (1967). The court never suggested that Deputy Jones or the fingerprint officer would

Rptr. 223, 227 (1976) (holding that court in which habeas petition is presented must file petition, determine whether it states prima facie claim for relief, and, if it does, decide whether to hear petition on merits or transfer it to another court for hearing). Even if the document was inappropriately styled, the court should have accepted it for filing and considered it on the merits.

fail to provide material and favorable evidence, or questioned the reasonableness of Robbins' request to call these witnesses. The court's refusal to subpoena the officers therefore arguably violated Robbins' right to compel the presence of witnesses on his behalf. *Id.*; *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982). If the appellate court believed that the record contained insufficient evidence of the witnesses' materiality, it could have remanded the case to the trial court for such a determination. Cal. Penal Code § 1260; *People v. Harris*, 36 Cal. 3d 36, 72, 201 Cal. Rptr. 782, 804 (1984).

## **2. "Moral certainty" reasonable doubt jury instruction.**

Not long before Goodwin filed his no-merit brief, this Court disapproved a reasonable doubt instruction that used "moral certainty" language that resembled the instruction given in this case. *Cage v. Louisiana*, 498 U.S. 39, 40 (1990). Although this Court decided four years later in *Victor v. Nebraska*, 511 U.S. 1 (1994), that the instruction given here comported with due process, its thorough analysis of the issue demonstrates that a contrary argument was not frivolous when Goodwin's no-merit brief was filed in 1991. *Id.* at 10-17. Robbins' failure to object to the instruction did not waive his right to raise the issue on appeal. *People v. Hannon*, 19 Cal. 3d 588, 600, 138 Cal. Rptr. 885, 892 (1977).

## **3. Failure to hear Robbins' motion to dismiss.**

The trial court had an obligation to consider Robbins' motion to dismiss for failure to preserve evidence; under the circumstances, it also had an obligation to hold an evidentiary hearing on the motion. *People v. Mayorga*, 171 Cal. App. 3d 929, 936-38, 218 Cal. Rptr. 830, 834-35 (1985) (emphasizing importance of evidentiary hearing given court's need to make factual findings, apply law, and fashion remedies to ensure fair trial). Had Robbins' motion been decided in his favor, the

court could have imposed sanctions on the prosecution. *People v. Medina*, 51 Cal. 3d 870, 894, 274 Cal. Rptr. 849, 864 (1990). At the very least, because the trial court failed to make any findings about whether law enforcement officers had acted in good faith in failing to preserve the evidence in question, Robbins was entitled to a remand for an evidentiary hearing on the issue. *People v. Anderson*, 59 Cal. App. 3d 831, 843, 131 Cal. Rptr. 104, 111 (1976).

## **4. Improper ex parte contact.**

Because Robbins acted as his own counsel, he had the right to be present during all conversations between the court and the prosecutor about the case. *Heavey v. State Bar*, 17 Cal. 3d 553, 131 Cal. Rptr. 40 (1976). Since the record suggests that an improper and undisclosed *ex parte* contact occurred, an appellate court could have concluded that Robbins was prejudiced. *Compare People v. Jennings*, 53 Cal. 3d 334, 382-85, 279 Cal. Rptr. 780, 810-12 (1991) (finding no showing of prejudice where court itself properly disclosed *ex parte* contact). Goodwin should at least have argued that the case be remanded for a determination of whether an *ex parte* contact occurred and whether it prejudiced Robbins. Cal. Penal Code § 1260. Even though Robbins did not preserve the issue with a contemporaneous objection, his failure should be excused: Neither the court nor the prosecutor revealed an *ex parte* contact to him.

## **C. Douglas Mandates Affirmance Of The Lower Courts' Decisions.**

This Court need not decide any issues surrounding the right to an *Anders* brief. As the Ninth Circuit and district court concluded, and as the Warden did not challenge in his petition for a writ of certiorari, Robbins had a right to a merits brief that zealously argued the arguable issues raised by his appeal. JA 47, 87-88. Goodwin's conclusory no-merit brief was clearly inadequate under *Douglas*. *Douglas*, 372 U.S. at 356-57.



## II. EVEN IF THE APPEAL HAD PRESENTED NO ARGUABLE ISSUES, ROBBINS' RIGHT TO COUNSEL WOULD HAVE BEEN VIOLATED BY COUNSEL'S FAILURE TO FILE AN *ANDERS* BRIEF.

Even if no arguable issues had been present, Robbins would have been entitled to an *Anders* brief, the minimum level of advocacy permitted by the Constitution. *McCoy*, 486 U.S. at 442. But Goodwin failed to file an *Anders* brief, filing instead a no-merit brief that identified no legal issues. Because his brief failed to meet *Anders*' minimum requirements, the Warden and his *amici* ask this Court effectively to overrule *Anders*. They stridently criticize *Anders*, but do so "based largely on misconceptions about *Anders*' requirements." Frederick D. Junkin, *The Right To Counsel In "Frivolous" Criminal Appeals: A Reevaluation of the Guarantees of Anders v. California*, 67 Texas L. Rev. 181, 187 (1988). It is therefore important to place *Anders* in its proper perspective and thereby reveal both its necessity and the invalidity of the criticism.

### A. A Non-Argumentative *Anders* Brief Provides The Minimum Level Of Representation Tolerated By The Constitution.

*Anders* essentially recognizes a "limited exception" to the requirement articulated in *Douglas* that indigent defendants are entitled to a merits brief in their first appeal as of right. *Penson*, 488 U.S. at 83. It limits *Douglas* by permitting appeals to be decided without the benefit of a merits brief in cases where no arguable issue exists. That narrow exception is based on and limited by the lawyer's state-law based ethical duty not to prosecute frivolous appeals. *McCoy*, 486 U.S. at 437-38. When an appeal presents no issues of arguable merit, the right to counsel on the first appeal as of right is met by the

filing of an *Anders* brief – which is the constitutional *minimum* level of advocacy required in such cases. *Id.* at 442 (describing "minimum requirements of *Anders*").<sup>16</sup>

### 1. The dilemma solved by *Anders*.

*Anders* resolved the dilemma presented by the apparently frivolous appeal. Counsel has a constitutional duty to argue on behalf of the client, but counsel often has a state-law based ethical obligation not to argue frivolous points. *Id.* at 437. This Court resolved that dilemma in *Anders* by holding that the client's right to zealous advocacy does not include the making of frivolous arguments. *Id.* at 437-48.

That holding raised two practical problems, which *Anders* also resolved. The first problem is that counsel's belief that an argument is frivolous may be incorrect. *Penson*, 488 U.S. at 81 n.4. Cases of apparent frivolousness might contain actual, though hidden, merit. This is not an uncommon phenomenon: "[V]ery often what may seem frivolous or unsupportable to counsel may seem otherwise in the eyes of the client or appellate court." *Freels v. Hills*, 843 F.2d 958, 963 (6th Cir. 1988). *Anders* solves that problem by requiring an *Anders* brief, which is designed to assist the court in verifying that the appeal is indeed so frivolous that a merits brief is not required. *McCoy*, 486 U.S. at 439, 441.

The second problem with the type of conclusory no-merit brief filed in *Anders* and here is one of fair process: Such a brief provides no meaningful representation. The *Anders* brief solves that problem too. The appellate lawyer functions as an advocate – without arguing issues – by filing an *Anders* brief that identifies the legal issues that competent counsel would at least have considered in assessing the appeal. *Nickols v. Gagnon*, 454 F.2d 467, 471 (7th Cir. 1971) (Stevens, J.).

<sup>16</sup> The states may provide more than the minimum level of advocacy by requiring lawyers to file merits briefs even in frivolous appeals, and some do. See, e.g., *State v. McKenney*, 98 Idaho 551, 568 P.2d 1213 (1977).



**2. The *Anders* brief provides the appellate court with the tools for deciding the appeal correctly.**

The point of *Anders* is to ensure the correctness of the appellate court's determination on the merits. *McCoy*, 486 U.S. at 439. Because the court, not counsel, is responsible for assessing the merits of the appeal, the court cannot rely on appointed counsel's conclusion that the appeal lacks merit. *Anders*, 386 U.S. at 744; *Ellis v. United States*, 356 U.S. 674, 675 (1958); cf. *Lane v. Brown*, 372 U.S. 477, 485 (1963) (holding court, not public defender, responsible for assessing merits of appeal).

But in our adversary system, the appellate court cannot properly decide appeals without any assistance from defense counsel. To assess the merits – and to test appointed counsel's conclusion that the appeal raises no arguable issues – the court must, as a constitutional minimum, have the assistance of an *Anders* brief. *Anders*, 386 U.S. at 744. That assistance, in conjunction with the court's own examination of the record, gives the court a proper foundation for determining whether the appeal raises any arguable issues. *Id.*; *McCoy*, 486 U.S. at 439, 442; *Penson*, 488 U.S. at 81-82. And "if [the court] finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal." *Anders*, 386 U.S. at 744; see also *Penson*, 488 U.S. at 83-84.

**3. The *Anders* brief serves several constitutionally significant functions.**

Those who criticize *Anders* fail to acknowledge the essential functions that the *Anders* brief serves. First, an *Anders* brief that properly references "all points which have sufficient significance that trained counsel would at least identify and consider them in his evaluation of an appeal" provides evidence of counsel's diligence in reviewing the record and the applicable law. *Nickols*, 454 F.2d at 471. Second, the *Anders* brief aids appellate courts in determining

whether the appeal is in fact so frivolous that there are no issues of even arguable merit. *McCoy*, 486 U.S. at 442; *Penson*, 488 U.S. at 82-84. Thus, the legal issues identified in an *Anders* brief assist the court in its review of the otherwise cold record. *McCoy*, 486 U.S. at 442.

The *Anders* brief thereby provides the minimum level of advocacy required by the Constitution and promotes the efficient disposition of appeals. It greatly reduces the burden on the appellate court by identifying the legal issues that competent counsel would at least consider. Without an *Anders* brief, the appellate court (1) is left "without an adequate basis for determining that [counsel] had performed his duty carefully to search the case for arguable error," and (2) is "deprived" of essential references to legal issues presented by the appeal, forcing the court to review a "cold record" on appeal. *Penson*, 488 U.S. at 82. The *Anders* brief therefore facilitates the court's efficient disposition of such appeals.

The *Anders* brief also serves a closely related third function. It "provides an independent inducement to counsel to perform a diligent review:"

'The danger that a busy or inexperienced lawyer might opt in favor of a one sentence letter instead of an effective brief in an individual marginal case is real, notwithstanding the dedication that typifies the profession. If, however, counsel's ultimate evaluation of the case must be supported by a written opinion "referring to anything in the record that might arguably support the appeal," *Anders*, 386 U.S. at 744 . . . , the temptation to discharge an obligation in summary fashion is avoided and the reviewing court is provided with meaningful assistance.'

*Penson*, 488 U.S. at 81 n.4 (quoting *Nickols*, 454 F.2d at 470). Without *Anders*, the number of conclusory no-merit briefs inevitably would skyrocket – as "busy or inexperienced lawyers" would no longer have any meaningful judicial check on their assessment of the case and no "independent inducement" to perform a diligent review of the record. See also *McCoy*,

486 U.S. at 442 (observing that counsel, in preparing an *Anders* brief, "may discover previously unrecognized aspects of the law" that result in filing a merits brief instead of an *Anders* brief).<sup>17</sup>

#### 4. The *Anders* brief is not impossible or unethical to write.

Contrary to some misguided criticism, the *Anders* brief is not "impossible" to write. As Justice (then Judge) Stevens recognized in *Nickols*, the only difference between an *Anders* brief and a merits brief is that a merits brief contains argument, while the *Anders* brief highlights issues but does not argue them. *Nickols*, 454 F.2d at 470-71. Drafting it is not difficult. Having just examined the record and studied available claims in drawing his or her own conclusions, which *Douglas* itself requires, appointed counsel is in an excellent position to draft an *Anders* brief quickly and efficiently. If such a brief were not required, the lawyer's efforts would be wasted and both the client and the court would be left with only the cold record. Difficult as it may be for an appellate court to locate arguable issues with counsel's help, it is much more difficult for the court to identify such issues without the

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<sup>17</sup> The fact that retained lawyers nearly always find arguable issues, whereas, according to one *amicus*, appointed lawyers in many states file no-merit briefs in twenty percent or more of their appeals, simply illustrates the maxim that necessity is the mother of invention. *Ariz. Am.* at 14-15 & n.5. When the incentive to find arguable issues is high for both lawyer and client – as it almost always is for non-indigents in criminal cases – that necessity inevitably bears fruit in the form of arguable issues raised in a merits brief. *Proceedings at the National Judicial Conference on Standards for the Administration of Criminal Justice*, 57 F.R.D. 229, 308-09 (1972) ("I can never remember a case where if the money was there the appeal was so frivolous that the lawyer couldn't make it;" maybe it has happened, "but maybe there are angels in the balcony, too.") (comments of Justice Day); *United States v. Edwards*, 777 F.2d 364, 365 (7th Cir. 1985) ("[S]peaking realistically, a criminal defendant who has money will always be able to persuade some lawyer to prosecute an appeal for him.").

assistance of the lawyer who knows the record best. Conversely, if counsel carelessly reviews the record or does an inadequate job of identifying legal issues, as some will, an inadequate *Anders* brief will give the appellate court a "basis for determining" that counsel has not performed his or her "duty carefully to search" for arguable error. *Penson*, 488 U.S. at 82.

Contrary to the Warden's suggestion, WB 32, *Anders* does not require counsel to "argue" frivolous claims. *Nickols*, 454 F.2d at 470-71. Rather, *Anders* requires counsel to refer to (not argue) issues that might be arguable but, as revealed by closer examination, in counsel's opinion are not. *Id.* at 470-71 & n.8; see *Anders*, 386 U.S. at 744 ("a brief referring to anything in the record that might arguably support the appeal") (emphasis added). The *Anders* brief, therefore, does not argue the defendant's contentions. (It is thus no substitute for an argumentative merits brief in cases where one is required. *Penson*, 488 U.S. at 84.) The *Anders* brief is a "professional exposition of all points which have sufficient significance that trained counsel would at least identify and consider them in his evaluation of an appeal." *Nickols*, 454 F.2d at 471. Thus, *Anders* does not require counsel to violate ethical norms by making frivolous arguments. *McCoy*, 486 U.S. at 436; see *Junkin*, 67 Texas L. Rev. at 187-92.

Nor does *Anders* "force appointed counsel to brief his case against his client," as the Warden suggests. WB 8-9, see also *CJLF Am.* 13-17 (same). *Anders*, 386 U.S. at 744. While *Anders* requires counsel to "identify" legal issues that competent counsel would consider, there is no constitutional requirement that counsel explain why counsel believes that the identified issues are frivolous. *Anders* requires only that the issues be identified.<sup>18</sup> Finally, although the states remain

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<sup>18</sup> Although the filing of an *Anders* brief implies that counsel believes that the client's appeal is frivolous, the same is true when counsel, like Goodwin here, files a no-merit brief that refers to no issues. In the former



free to require counsel to explain the reasons supporting counsel's conclusion, and some have done so, this Court has never suggested that such an explanation is constitutionally mandated.<sup>19</sup>

### III. THERE IS NO CONSTITUTIONAL CONFLICT BETWEEN *DOUGLAS-ANDERS* AND THE CALIFORNIA SUPREME COURT'S NO-MERIT PROCEDURE.

The Warden argues that (1) the California Supreme Court has adopted an alternative procedure, the so-called *Wende* procedure, which permits counsel to file a conclusory no-merit brief that does not identify any legal issues at all, and (2) the *Wende* procedure is constitutional. WB 13, 22-24 (citing *People v. Wende*, 25 Cal. 3d 436, 158 Cal. Rptr. 839 (1979)). The Warden is wrong on both points.

First, the California Supreme Court does not permit counsel to file a conclusory no-merit brief that fails to identify any legal issues. *In re Sade C.*, 13 Cal. 4th 952, 980 n.8, 994 n.22, 55 Cal. Rptr. 2d 771, 787 n.8, 797 n.22 (1996). Although the California Court of Appeal failed to require Goodwin to file a merits or *Anders* brief in Robbins' case, that failure to comply with *Douglas* and *Anders* is not justified by any alternative procedure authorized by the California Supreme Court. Because there is no authorized California procedure conflicting with *Anders*, there is no basis for exempting California from the *Anders* rules.

Second, even if the California Supreme Court had authorized such a procedure, it would be unconstitutional. As a

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case, however, the several constitutionally significant functions of an *Anders* brief are served.

<sup>19</sup> The *Anders* brief required in *McCoy* included a description of counsel's reasons for believing the appeal to be frivolous because that discussion was required by Wisconsin law. It is not required by *Anders*, although the inclusion of such a discussion does not violate *Anders*. *McCoy*, 486 U.S. at 442.

constitutional minimum, *Anders* requires the filing of a brief referring to the legal issues presented by the appeal.

#### A. The Warden Mischaracterizes California Law.

##### 1. The California Supreme Court's procedure for protecting the right to counsel on appeal.

In *Sade C.*, the California Supreme Court analyzed *Anders* and its progeny in light of the "two major" California Supreme Court cases that establish California's procedures for handling appeals when appointed counsel concludes that they are frivolous. *Sade C.*, 13 Cal. 4th at 979, 55 Cal. Rptr. 2d at 786; see CAAL Am. 5, 11 (citing *Sade C.*). The first case, *People v. Feggans*, 67 Cal. 2d 444, 62 Cal. Rptr. 419 (1967), expressly recognized that the *Anders* procedures are binding in California courts and set forth those requirements in a manner "comfortably within" the requirements stated in *Anders*. *Sade C.*, 13 Cal. 4th at 979, 55 Cal. Rptr. 2d at 786.

The second case is *People v. Wende*, *supra*. Contrary to the Warden's representation, the court in *Wende* did not "devise a method" or hold that counsel may file a brief that identifies no legal issues at all, a procedure that would conflict with *Anders*. WB 18. Indeed, the court in *Wende* described the *Anders* procedure in approving terms, including the requirement that, if counsel believes the appeal to be wholly frivolous, counsel must file "a brief referring to anything in the record that might arguably support the appeal." *Wende*, 25 Cal. 3d at 439, 158 Cal. Rptr. at 841 (quoting *Anders*, 368 U.S. at 744).<sup>20</sup>

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<sup>20</sup> The opinion in *Wende* observed, in passing, that appointed counsel in the case before it had filed a brief that "raised no specific issues." *Wende*, 25 Cal. 3d at 438, 158 Cal. Rptr. at 840. It is not clear whether the court meant that the brief raised no arguable issues or that counsel had failed even to identify any legal issues. What is clear, however, is that the court in *Wende* affirmatively recognized the constitutional requirement of filing an *Anders* brief, *id.* at 439, 158 Cal. Rptr. at 841, and quoted *Feggans*, which



As recognized in *Sade C.*, *Wende* reaches beyond *Anders* only in holding that, as a matter of state-law ethical rules, appointed counsel is not required to withdraw if counsel believes that the appeal is frivolous. *Sade C.*, 13 Cal. 4th at 980-81, 55 Cal. Rptr. 2d at 787 (citing *Wende*, 25 Cal. 3d at 441-42, 158 Cal. Rptr. at 842). The court in *Wende* held that counsel need not withdraw because "there may be practical benefits to the court and the client from counsel's remaining on the case" in "at least a formal capacity." *Sade C.*, 13 Cal. 4th at 980-81, 55 Cal. Rptr. 2d at 787. Appellate counsel's merely formal presence may be helpful if the court, after its review of the record, seeks the assistance of counsel on behalf of the defendant. *Id.*<sup>21</sup>

**2. The California Supreme Court's procedure is identical to *Douglas* and *Anders* in requiring a merits or *Anders* brief.**

The Warden's position is based on the contention that, under California's *Feggans-Wende* procedure, an *Anders* brief is not required as long as counsel does not formally seek to withdraw. A conclusory no-merit brief that recites only the procedural background and statement of facts – but is devoid of any reference to legal issues – is supposed to be made satisfactory by the merely formal presence of counsel. WB 8-9. The California Supreme Court has expressly rejected the Warden's characterization of California law.

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expressly stated that a brief identifying legal issues is required. *Id.* at 440, 158 Cal. Rptr. at 841 (quoting *Feggans*, 67 Cal.2d at 447-48, 62 Cal. Rptr. at 421). Most significantly, however, the question whether an *Anders* brief identifying legal issues is required was neither before nor considered by the *Wende* court.

<sup>21</sup> *Anders*' statement that counsel should move to withdraw upon concluding that the appeal is frivolous is based on the Court's assessment of counsel's state-law based ethical duties. *Polk County v. Dodson*, 454 U.S. 312, 324 (1981) (stating that duty not to argue frivolous points is general ethical limitation on counsel); *McCoy*, 486 U.S. at 440.

Although counsel need not "formally withdraw" under *Wende*, counsel's failure to file a merits brief amounts to "substantial withdrawal." *Sade C.*, 13 Cal. 4th at 980, 55 Cal. Rptr. 2d at 787 (emphasis in original). As a result, "all the steps specified by *Anders* [have] to be taken, other than those dependent on the filing of a motion to withdraw." *Id.* In so concluding, the state high court expressly *rejected* the notion that an *Anders* brief is not required. *Id.* at 980 n.8, 55 Cal. Rptr. 2d at 787 n.8.<sup>22</sup>

The court in *Sade C.* recognized that the court in *State v. Balfour*, 311 Or. 434, 450, 814 P.2d 1069 (1991), held that the "federal constitution requires an *Anders* brief only when counsel seeks to withdraw." *Sade C.*, 13 Cal. 4th at 980 n.8, 55 Cal. Rptr. 2d at 787 n.8 (emphasis in original). But the California high court concluded that the *Balfour* court "erred" in so holding. *Id.* That is because counsel's continued presence is merely formal. *Id.* at 980, 55 Cal. Rptr. 2d at 787. Counsel who refrains from moving to withdraw but fails to file a merits or *Anders* brief does nothing more than withdrawing counsel. Thus, "substantial withdrawal is equivalent to formal withdrawal." *Id.* (emphasis in original).

The *Balfour* court's reliance on counsel's merely formal presence elevates form over substance. This Court in *Anders* tied the constitutionally-based requirement to file an *Anders* brief to the state-law based filing of a motion to withdraw only because it presumed that these events would occur at the

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<sup>22</sup> Even if this analysis is dictum, it is "considered dictum" of the California Supreme Court, which is "highly persuasive" under California law. *Evans v. City of Bakersfield*, 22 Cal. App. 4th 321, 328, 27 Cal. Rptr. 2d 406, 409 (1994). Where, as here, a state high court interprets its own prior decisions, that interpretation should be dispositive. *Cf. Stringer v. Black*, 503 U.S. 222, 235 (1992) ("[I]t would be a strange rule of federalism that ignores the view of the highest court of the State as to the meaning of its own law."). To the extent that the Warden relies upon language in *Wende* that he claims is contrary to both *Anders* and *Sade C.*, that language is not "considered dictum." The court in *Wende* never considered whether an *Anders* brief is required.

same time. But even if a state's rules of ethics do not require counsel to withdraw (something not anticipated in *Anders*), there is still the same need for an *Anders* brief if no merits brief is filed. Counsel's merely formal presence does nothing to serve the multiple functions of an *Anders* brief.

Consequently, when appointed counsel in California fails to file a merits brief, that counsel must file an *Anders* brief that contains "law as well as facts." *Sade C.*, 13 Cal. 4th at 994 n.22, 55 Cal. Rptr. 2d at 797 n.22. The brief must have " 'ready references not only to the record, but also to . . . legal authorities. . . . ' " *Id.* (quoting *Anders*, 386 U.S. at 745). An *Anders* brief that fails to " 'discuss legal issues with citations to appropriate authority' " is therefore insufficient under California's *Feggans-Wende* procedure. *Id.* (quoting *Feggans*, 67 Cal. 2d at 447, 62 Cal. Rptr. at 421). The brief filed on Robbins' behalf, which plainly failed to refer to any legal issues, thus violated both *Anders* and California's own procedure.

### **3. The absence of a state-authorized procedure that is contrary to *Anders* defeats the Warden's argument.**

The "precise rationale" for this Court's decisions concerning access to the judicial process has not been composed because these cases " 'cannot be resolved by resort to easy slogans or pigeonhole analysis.' " *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996) (quoting *Bearden v. Georgia*, 461 U.S. 660, 666 (1983)). The cases raise both equal protection and due process concerns. *Id.* But no matter how they are analyzed, one thing is clear: This Court's role is to "inspect the character and intensity of the individual interests at stake, on the one hand, and the state's justification for its exaction, on the other hand." *Id.* at 120-21 (citing *Bearden*, 461 U.S. at 666-67).

That inspection was made in *Anders*, where the Court must have found, not surprisingly, that the individual's fundamental interest in meaningful legal representation on the first

criminal appeal outweighed the state's justification for permitting counsel to file a conclusory no-merit brief. The economic burden on the state is quite small given appointed counsel's undisputed obligation under *Douglas* conscientiously to review the record and the law before concluding that the appeal lacks merit. Indeed, the job of state judges is made easier when they have an *Anders* brief, which identifies legal issues raised by the appeal, rather than only the cold record to review. The extra economic burden of compensating counsel for filing an *Anders* brief also is minimal – given the work that counsel must already have done in reviewing the record and applicable law.

Furthermore, the Warden's position today is *not* based on a state-authorized procedure, as it was in *Anders*. *See In re Nash*, 61 Cal. 2d 491, 39 Cal. Rptr. 205 (1964). The Warden's proposed no-merit procedure has never been authorized by the California legislature and is flatly inconsistent with the procedure mandated by the state's high court. Consequently, there is no "State justification" to weigh against the fundamental individual interest at stake. That alone defeats the Warden's attempt to change California law from without.

### **B. Even If The California Supreme Court Had Adopted The Warden's Procedure, That Procedure Would Be Unconstitutional.**

The *Douglas* and *Anders* rules are clear: The defendant is entitled to a merits brief in all cases of arguable merit and to an *Anders* brief in appeals that raise no arguable issues. These are rules of general application – fitting all first appeals as of right. The procedure that the Warden incorrectly characterizes as California's *Wende* procedure would permit counsel to refrain from filing an *Anders* brief. That procedure clearly violates *Anders*. Contrary to the Warden's assertion, there is no basis for exempting California from the *Anders* requirements.



**1. The state appellate court's unaided review of the record does not excuse counsel's failure to file an *Anders* brief.**

The Warden argues that an *Anders* brief is unnecessary in California because appellate courts there review "the entire record." WB 22. (In fact, the state appellate court here did not have, and therefore did not review, the entire record.) The same argument was made and rejected in *Anders* because the appellate court's review of the cold record – without the aid of an *Anders* brief – creates too high a risk that arguable issues will be missed. By filing an *Anders* brief, counsel (1) helps to focus the court's attention on issues that a competent attorney would at least consider, and (2) minimizes the court's burden in such appeals.

The Warden may seek to distinguish *Anders* on the ground that Goodwin filed a no-merit brief containing a two-page statement of the case and "a detailed six-page statement of facts." WB 24. That "brief," however, even apart from its many other deficiencies, failed to identify any legal issues at all – a clear violation of *Anders*. It therefore left the court "without an adequate basis for determining that [counsel] had performed his duty carefully to search the case for arguable error and also deprived the court of the assistance of an advocate in its own review of the cold record on appeal." *Penson*, 488 U.S. at 82.

**2. The addition of a CAP lawyer does not alter the constitutional balance.**

The Warden injects into his brief considerable detail about the California Appellate Project ("CAP"), though much of it is not in the record and is belied by the facts of this case. His argument reduces to the following: The functions served by an *Anders* brief – to assist the court in its review of both the record and counsel's performance – are not required if a second attorney merely consents to the filing of a conclusory

no-merit brief. WB 8. The Warden misses the point of *Anders*, as made clear in *Penson* and *McCoy*.<sup>23</sup>

An *Anders* brief provides the appellate court with two things: evidence that appointed counsel has met his or her duty of providing the client with a diligent and thorough search of the record for any arguable claims that might support the appeal, and references to legal issues presented by the appeal that assist the court in its review of the record, so that it can determine whether any arguable issues exist. *McCoy*, 486 U.S. at 442. The CAP attorney's mere concurrence in the filing of a no-merit brief does not assist the court in either of these tasks.

Indeed, the state made precisely the same argument in *Anders*. It argued that the defendant there was not denied his right to counsel because California's no-merit brief procedure provided for a multi-layered review. Brief for Respondent in *Anders*, O.T. 1966, No. 98, p. 19. It emphasized that the defendant in *Anders* had two appointed lawyers – one on direct appeal and another on habeas review – neither of whom could identify any arguable issues. *Id.* The state also argued that appellate courts in California "read the full record" in assessing the merits of indigent defendant appeals, and that the appellate court had found no meritorious issues. *Id.* at 30-31. (Exactly the same argument is made by the Warden here – down to the number of state-appointed lawyers (two) who failed to discover merit to the appeal. WB 8, 13, 34.) The state relied on this multi-layered review to argue in *Anders* that counsel's filing of a conclusory no-merit brief raised no constitutional issues. This Court flatly rejected the state's argument. *Anders*, 386 U.S. at 744-45.

<sup>23</sup> There is no evidence that a CAP attorney reviewed the entire record here, though the Warden repeatedly implies that this occurred. WB 8, 20-21. Goodwin stated only that he "consulted" with CAP and received its permission to file a no-merit brief. JA 43. Robbins therefore moves to strike all references to CAP that are not in the record or properly subject to judicial notice. *Adickes v. Kress & Co.*, 398 U.S. 144, 157-58 n.16 (1970); *Johnson v. United States*, 426 F.2d 651, 656 n.8 (D.C. Cir. 1970).



This Court's reasoning is still sound. The court, not counsel, is responsible for determining whether arguable issues exist. *McCoy*, 486 U.S. at 439. Without an *Anders* brief, the accuracy of the appellate process is jeopardized because the court must assess the merits without counsel's assistance in identifying legal issues. *Anders*, 386 U.S. at 744; *Penson*, 488 U.S. at 82; cf. *Ellis*, 356 U.S. at 675 (holding that conclusion of two appointed lawyers that appeal was frivolous is not controlling; court itself must determine whether appeal is frivolous).

**3. The merely formal presence of counsel does nothing to reduce the need for an *Anders* brief.**

The Warden relies on *State v. Balfour*, *supra*, which holds that counsel may refrain from filing an *Anders* brief as long as counsel does not formally withdraw. *Id.* at 451, 814 P.2d at 1079. The *Balfour* court's analysis, however, defies logic. First, the court failed to recognize that appointed counsel in *Anders* was also formally present at all stages of the appellate process. *Anders*, 386 U.S. at 739-40. But counsel's merely formal "presence" in *Anders*, which is no different than occurs today under California's (or Oregon's) current practices, did not make counsel's conclusory no-merit brief constitutionally sufficient. The client in *Anders*, even with his counsel formally present, was still "forced to shift entirely for himself." *Id.* at 745.

Second, as the California Supreme Court has also concluded, the merely formal presence of counsel, which amounts to "substantial withdrawal," does *nothing* to assist the court either in its assessment of counsel's performance or in the court's own review of the record. *Sade C.*, 13 Cal. 4th at 980, 55 Cal. Rptr. 2d at 787. Counsel's merely formal

presence thus fails to advance the multiple functions served by an *Anders* brief. See, e.g., *Penson*, 488 U.S. at 82.<sup>24</sup>

**IV. PREJUDICE SHOULD BE PRESUMED WHENEVER COUNSEL FILES A CONCLUSORY NO-MERIT BRIEF.**

**A. The Warden Waived The Prejudice Argument.**

The Warden argues that the failure to file a constitutionally adequate no-merit brief should be measured under the prejudice standard enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984), rather than that set forth in *Penson*, 488 U.S. at 78. But that argument was *not* made before the Ninth Circuit; and the Warden conceded before the district court that prejudice must be presumed, at least where, as here, the appeal presents arguable issues. JA 47; SER 450.<sup>25</sup> As a result, the Warden has waived the argument. *United States v.*

<sup>24</sup> Several federal appellate courts have likewise concluded that counsel's merely formal presence is not constitutionally significant or sufficient. See, e.g., *United States v. Burnett*, 989 F.2d 100, 104 (2d Cir. 1993); *United States v. Griffy*, 895 F.2d 561, 562-63 (9th Cir. 1990) (*per curiam*); *Lombard v. Lynaugh*, 868 F.2d 1475, 1481 (5th Cir. 1989); *Freels v. Hills*, 843 F.2d at 962-64; *Jenkins v. Coombe*, 821 F.2d 158, 161-62 (2d Cir. 1987).

<sup>25</sup> The following exchange occurred during oral argument in the district court:

THE COURT: Do you then admit if the Court were to find under the appropriate standard, whatever that might be, that there were issues that were arguable and could have and should have been raised, but were not, do you then concede that prejudice is presumed?

[Counsel for the Warden]: I believe it is.

THE COURT: And then [Robbins] would be entitled to a new appeal?

[Counsel for the Warden]: I believe so.

*Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994); *Delta Airlines v. August*, 450 U.S. 346, 362 (1981).

**B. Principles Of Federalism, Comity, And Efficiency Mandate A Rule Of Presumed Prejudice When Counsel Fails To Argue Or Refer To Any Legal Issues At All.**

This Court held in a nearly unanimous decision in *Penson* that, when an indigent criminal appellant is actually or constructively denied appellate representation, prejudice must be presumed. *Penson*, 488 U.S. at 88; *see also United States v. Cronin*, 466 U.S. 648, 659-60 (1984) (stating that prejudice is presumed when counsel is unavailable at "critical stage" of trial); *Strickland*, 466 U.S. at 692 ("Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.").

Counsel's complete failure to file a merits or *Anders* brief is a constructive denial of counsel because the filing of such a brief is the essence of appellate legal representation. When counsel fails to file a brief that argues or refers to any legal issues at all, as Goodwin did here, the client "must shift entirely for himself while the court has only the cold record which it must review without the help of an advocate." *Anders*, 386 U.S. at 745.

**1. Prejudice must be presumed if counsel fails to file a merits brief when arguable issues exist.**

This Court already has held that prejudice must be presumed if counsel fails to file a merits brief when arguable issues exist. *Penson*, 488 U.S. at 86. The appointed lawyer in *Penson* filed a conclusory no-merit brief that failed to argue or even refer to any legal issues – just as in *Anders* and in this case. By that complete lack of advocacy, counsel abandoned his client at a critical stage of the appeal. Counsel's failure to file a merits brief also deprived the appellate court of the

minimum assistance of counsel needed for the court to assess the merits of the appeal. *Id.* at 82.

This Court rejected the state's contention that indigent defendants on habeas review must show prejudice when counsel fails to raise any arguable issues at all. *Id.* at 86. Any such prejudice inquiry would require the federal court on habeas review to speculate whether a merits brief would have made a difference *to the state appellate court* reviewing the record for reversible error under *state* law and federal constitutional law. *Id.* at 87. To permit such speculation "would render meaningless the protections afforded by *Douglas* and *Anders*." *Id.* at 86.

Moreover, as argued further below, the federal court's consideration of state law and federal constitutional issues *before* the state court has a meaningful opportunity to resolve such issues with the aid of a constitutionally adequate brief would offend principles of comity, federalism, and efficiency.

**2. Prejudice must be presumed when counsel fails to file an *Anders* brief in appeals apparently lacking arguable issues.**

Here, as in *Penson*, there are arguable issues that should be decided in the first instance by the state appellate court with the benefit of a merits brief. But even in appeals where there are *apparently* no issues of arguable merit, prejudice should still be presumed if counsel fails to file an *Anders* brief in state court. Just as counsel's failure to file a merits brief is an abandonment of counsel on appeal when issues of arguable merit exist, *id.*, so too is counsel's failure to file an *Anders* brief when no issues of arguable merit *appear* to exist. *Freels*, 843 F.2d at 963; *Castellanos v. United States*, 26 F.3d 717, 718-19 (7th Cir. 1994) (Easterbrook, J.) (recognizing that prejudice component of *Strickland* does not apply when counsel fails to file merits brief or comply with *Anders* requirements).

There are three important reasons why prejudice must be presumed. First, because there is generally no right to counsel



in federal habeas proceedings, federal courts are often forced on habeas review to engage in an unaided review of the cold record – a review that is just as inadequate as the state court's unaided review of the same record. When the state court denies an appeal on the merits without benefit of at least an *Anders* brief, the harm cannot be cured by a federal court's equally unguided assessment of the merits. To require petitioners – usually acting without counsel – to show prejudice under these circumstances would render *Anders* a dead letter. See *United States v. Tajeddini*, 945 F.2d 458, 467 (1st Cir. 1991) (*per curiam*) (requiring unrepresented habeas petitioner to show prejudice from denial of appellate counsel “would deprive the defendant of one of the very benefits of appellate counsel – review by counsel for the purpose of identifying potential appellate issues”) (citing *Anders*, 386 U.S. at 744-45) (Breyer, Campbell, Selya, JJ.); cf. *Peguero v. United States*, \_\_\_ U.S. \_\_\_, \_\_\_, 119 S. Ct. 961, 965-66 (1999) (O'Connor, J., concurring) (noting that habeas petitioners, who are often without “a lawyer to identify and develop arguments on appeal,” should not be required to show “meritorious grounds for appeal” when failure to file timely appeal is due to court's error).

Second, the state appellate court on direct appeal reviews the record for error under both state law and federal constitutional law. If this Court were to require federal courts to find actual prejudice (not presume it), state courts would be deprived of the opportunity to address state law and constitutional issues in the first instance – as principles of federalism and comity dictate. This Court noted in *Penson* that state courts, not federal courts, should rule on issues of state law with the benefit of a constitutionally adequate brief. *Penson*, 488 U.S. at 87 n.9.<sup>26</sup> The state court should also have the first

<sup>26</sup> See also transcript of oral argument before the Ninth Circuit at 11-12 (lodged) (argument of Warden's counsel). Cf. *Granberry v. Greer*, 481 U.S. 129, 134-35 (1987) (holding that, if habeas petition presents unresolved question of state law that may have bearing on petition, issue

opportunity to address constitutional issues with the benefit of a constitutionally sufficient brief. Cf. *O'Sullivan v. Boerckel*, \_\_\_ U.S. \_\_\_, \_\_\_, No. 97-2048, 1999 U.S. LEXIS 4003, at \*13 (June 7, 1999) (stating that comity dictates that state court should have first opportunity to rule on issues of federal constitutional law).

If prejudice is not presumed, federal courts will be required to decide whether the appeal raises meritorious issues (not simply arguable issues) of state or constitutional law *before* the state court has the opportunity to do so with a constitutionally adequate brief. And because there is no general right to counsel in habeas proceedings, the federal court's merits analysis will often be without benefit of either a lawyer's brief filed in the habeas proceedings or the *Anders* brief that should have been filed in state court. The absence of any defense-side briefing will render the federal court's determination of whether there are arguable issues both intrusive of state sovereignty and highly dubious on the merits. See *Entsminger v. Iowa*, 386 U.S. 748, 752 (1967) (“Since petitioner admittedly has not received the benefit of a first appeal with a full printed abstract of the record, briefs, and oral argument, as was his right under Iowa law, we do not reach the merits of his conviction here.”).

Third, efficiency is also furthered by a bright-line rule of presumed prejudice. When an *Anders* brief is filed in state court, the federal court's limited function on habeas review is to determine whether there are any arguable issues, a minimal threshold, without speculating as to how the state court would resolve those issues. If no *Anders* brief is filed at all, the federal court's task is even simpler. It must grant the petition

should be resolved in state court first); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 508 (1985) (O'Connor, J., concurring) (noting that principles of comity and federalism may require federal courts to defer ruling on federal constitutional issues that are entwined with interpretation of state law).



so that the state court can determine, with the benefit of an *Anders* brief, whether there are arguable issues.

The Warden argues that Robbins will receive an undeserved "windfall" if his habeas petition is granted. WB 33. But the only consequence of this Court's affirmance will be that Robbins' appeal will be decided by the court that should have decided it, with sufficient briefs, in the first instance – the state appellate court. Nor can a fresh state appeal properly be compared to a new trial, with all the attendant problems and taxing of judicial and other resources that a new trial entails. In most cases there will simply be (1) a new, constitutionally adequate brief that addresses issues raised by an already existing record, and (2) a decision on the merits by the state appellate court, made with the benefit of that constitutionally adequate brief.

**3. Prejudice must be presumed here because counsel's abandonment went beyond the failure to file a brief.**

The failure to file a merits or *Anders* brief is a *per se* abandonment of counsel sufficient *in itself* to trigger a presumption of prejudice. But the inadequacy of appellate representation here went far beyond the failure to file a merits or *Anders* brief. Goodwin abandoned Robbins on appeal not just by failing to file a merits or *Anders* brief, but also by failing to review the entire record, including important portions of the record that revealed arguable issues, and by failing to support Robbins' requests to augment the record, including portions of the record that established Robbins' arguable issues. *See supra* at 8-10; *Penson*, 488 U.S. at 82 n.5 (noting that counsel serves important function by making sure that record on appeal "accurately and unambiguously reflects all that occurred" below). These additional facts establish beyond cavil that Goodwin constructively abandoned Robbins on appeal.

**V. *TEAGUE v. LANE* WAS NOT VIOLATED.**

**A. The Clear Rules Stated In *Douglas* And *Anders* Are Not New.**

*Douglas* and *Anders* established two clear and simple rules: As the minimum level of advocacy permitted by the Constitution, a merits brief must be filed in non-frivolous appeals, and an issue-spotting *Anders* brief must be filed in frivolous appeals. *Douglas*, 372 U.S. at 358; *Anders*, 386 U.S. at 744-45. These rules are unambiguous. *Anders*, 386 U.S. at 744; *Penson*, 488 U.S. at 80-81, 83 (characterizing requirement of merits brief in appeals of arguable merit as "unambiguous"); *McCoy*, 486 U.S. at 439. The Warden conceded below that "federal law has remained consistent." Transcript of oral argument before the Ninth Circuit at 6 (lodged).

The Ninth Circuit's ruling – that the failure to file a merits brief in an appeal of arguable merit violated the constitutional rule established in *Douglas* and *Anders* – was dictated by long-established precedent. As a result, the *Teague* anti-retroactivity doctrine was not violated. *Teague v. Lane*, 489 U.S. 288, 301 (1989).<sup>27</sup>

<sup>27</sup> Moreover, *Teague* does not bar federal courts from creating new rules of constitutional criminal procedure when state court procedures do not provide for a fair and full opportunity to litigate the matter at trial or on direct appeal. *See* James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 25.6, at 1012, 1015-18 (3d ed. 1998). Such claims should be considered non-final for *Teague* purposes so that both petitioner and federal courts have a fair opportunity to address such issues of constitutional law. *Id.* The need to delay finality under these limited circumstances is particularly acute in the context of denial of counsel on appeal, where the state court does not have the opportunity meaningfully to address the constitutional issue because the only lawyer purporting to represent the defendant on direct appeal is the one guilty of the violation. That lawyer is in no position to raise the issue. The issue can meaningfully be raised only *after* the direct appeal process is completed. *Cf. Withrow v. Williams*, 507 U.S. 680, 688 (1993) (noting that violations of right to counsel "would often go unremedied" if left to review on direct

**B. The Warden's *Teague* Argument Is Based On The Faulty Premise That California Law Violates *Douglas* and *Anders*.**

The Warden's *Teague* argument is premised on the notion that California has adopted a procedure that deviates from the rules established in *Anders*. Because that premise is wrong, this Court need not consider the Warden's *Teague* argument. The state court of appeal simply failed to follow the *Anders* rules – a mistake that this Court should not treat as authorized under California law, given the California Supreme Court's contrary interpretation of its own court-made law. *Stringer v. Black*, 503 U.S. at 235. The Warden's *Teague* argument is therefore invalid due to his misinterpretation of California law.

**C. The Warden's *Teague* Argument Would Be Wrong Even If California Had Adopted A Procedure Violating *Douglas* and *Anders*.**

There would be no violation of *Teague* even if the Warden's characterization of California's *Feggans-Wende* procedure were accurate. The Warden argues that California should be exempt from the clear rules of *Douglas* and *Anders* because the state's high court in *Wende* adopted a different procedure that permits the filing of a conclusory no-merit brief that refers to no legal issues. The Warden argues that, because this Court has never before invalidated California's alleged *Wende* procedure, the Ninth Circuit's conclusion that there is no basis for such an exemption is, by definition, the application of an old rule to "novel" circumstances.<sup>28</sup> Thus,

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appeal). For that reason, the *Teague* doctrine should not apply to Robbins' claims.

<sup>28</sup> The Warden reads too much into the fact that no prior reported decisions challenge the practice of failing to file an *Anders* brief in California. WB 45. The issue cannot be raised on direct appeal because the offending counsel will not raise it. Nor will it likely be raised in collateral

the application of *Douglas* and *Anders* amounts to a "new rule." The Warden's bootstrap argument reduces to this: The application of an existing constitutional rule is a "new rule" whenever a state's attempt to evade the existing rule has not been expressly rejected by this Court before the petitioner's conviction became final.

**I. The Warden's bootstrap argument would nullify existing rules of constitutional criminal procedure.**

The Warden's argument betrays a misunderstanding of *Teague*. *Teague* simply requires federal courts on habeas review to apply the federal constitutional rules in place at the time the conviction became final. *Teague*, 489 U.S. at 310. It does not require that federal courts defer to a state-court interpretation of existing federal constitutional law that would permit an exemption from an existing constitutional rule. *Wright v. West*, 505 U.S. 277, 304 (1992) (O'Connor, J., concurring). Thus, even if the California Supreme Court had concluded that *Douglas* and *Anders* should not apply where appointed appellate counsel does not move to withdraw, its interpretation of federal law would not be entitled to any deference under *Teague*. *Id.* at 308 (Kennedy, J., concurring). The standard for determining whether application of an existing rule to a particular fact pattern amounts to a new rule is objective; the existence of conflicting authority is therefore not dispositive. *Stringer*, 503 U.S. at 237.

It is true that the application of an existing rule to new and unforeseen circumstances may sometimes amount to a "new rule." *Id.* at 228. But *Douglas* and *Anders* articulate rules of general application that apply in *all* first criminal

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attack, where there is no right to appointed counsel. Further, the Warden ignores *United States v. Griffy*, 895 F.2d at 562, in which Judges Kozinski, Rymer, and Browning held that if California's *Feggans-Wende* procedure does not require the filing of an *Anders* brief, as counsel there argued, the procedure is unconstitutional.

appeals as of right. This case therefore does not involve a "novel" application of *Douglas* and *Anders* because those rules apply by design to all first appeals as of right. The mere fact that a state court believes that it should be exempt from an existing constitutional rule does not make the existing constitutional rule "new." Simply put, *Teague* was not meant to insulate from scrutiny state procedures designed to evade existing rules of constitutional criminal procedure.

Further, the Warden's bootstrap argument would undermine the deterrent function of habeas review: "The threat of habeas serves as a necessary incentive to trial and appellate judges throughout the land to conduct their proceedings in a manner consistent with established constitutional principles." *Teague*, 489 U.S. at 306 (quoting *Desist v. United States*, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting)). Indeed, this Court has characterized deterrence as the "leading purpose of federal habeas review." *Graham v. Collins*, 506 U.S. 461, 467 (1993). That function would be thwarted if *Teague* were interpreted to insulate from habeas review state court decisions that purport to recognize exemptions from clear, pre-existing constitutional rules.

## 2. Counsel's mere formal presence is immaterial.

The *Douglas* and *Anders* rules are rules of "general application" that apply to all first appeals as of right. A rule of general application will *only infrequently* yield a result "so novel that it forges a new rule, one not dictated by precedent." *Wright*, 505 U.S. at 309 (Kennedy, J., concurring). Simply put, "[i]f a proffered factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies, the distinction is not meaningful, and any deviation from precedent is not reasonable." *Id.* at 304 (O'Connor, J., concurring); cf. *Mackey v. United States*, 401 U.S. 667, 695 (1971) (Harlan, J., concurring in part, dissenting in part) (stating that purpose of inquiry is "to determine whether a

particular decision has really announced a 'new' rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law").

The proffered factual distinction here – counsel's merely formal presence on appeal – does not change the force of the precedent's clear underlying principle, which emerges from the entire *Douglas-Anders-McCoy-Penson* line of cases. See *Stringer*, 503 U.S. at 232 (describing "clear principle" as emerging from long line of authority). The principle is that the filing of a merits or *Anders* brief is the *minimum* level of legal assistance permitted by the Constitution. The merely formal presence of an attorney does not in any way serve the functions of a merits or *Anders* brief. When counsel fails to file a merits or *Anders* brief, but merely remains formally present, the court and client are in exactly the same position as if counsel had filed a motion to withdraw without an *Anders* brief. Indeed, in *Anders* itself, counsel remained formally present. The proposed distinction is therefore without constitutional difference.

## VI. CONCLUSION

For these reasons, this Court should affirm the Ninth Circuit's decision.

Respectfully submitted,

RONALD J. NESSIM

*Counsel of Record*

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**APPENDIX A**

[Handwriting In Italics]

**MUNICIPAL COURT OF LOS CERRITOS  
JUDICIAL DISTRICT**

**COUNTY OF LOS ANGELES, STATE OF CALIFORNIA**

THE PEOPLE OF THE  
STATE OF CALIFORNIA,

Plaintiff

v.

LEE ROBBINS,  
aka LEROY ROBINSON,  
aka LEROY ROBBINS,  
aka DOUGLAS KENT  
SPAULDING,  
aka LEE RICHARD  
ROBBINS

Defendant(s)

Case No. A481636

Prelim 12-5-89

FELONY COMPLAINT  
FOR EXTRADITION

FILED  
DEC 12 1989

FRANK S. ZOLIN,  
COUNTY CLERK  
[illeg. signature stamp]

The undersigned is informed and believes that:

**COUNT 1**

On or about December 31, 1988, in the County of Los Angeles, the crime of MURDER, in violation of PENAL CODE SECTION 187(a), a Felony, was committed by LEE ROBBINS, who did willfully, unlawfully, and with malice aforethought murder Douglas Spaulding, a human being. It is further alleged that the above offense is a serious felony within the meaning of Penal Code Section 1192.7(c)(1).

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It is further alleged that in the commission and attempted commission of the above offense, the said defendant(s), LEE ROBBINS, personally used a firearm(s) within the meaning of Penal Code Sections 1203.06(a)(1) and 12022.5 and also causing the above offense to become a serious felony pursuant to Penal Code section 1192.7(c)(8).

SEP 11 1989 PD APPT - ARR 9-15-89 9 DI no bail ZHZ

\* \* \*

SEP 15 1989 PH. 10-19-89 9 DI bail none ZHZ

OCT 19 1989 PH 12-5-89 9 DI no bail t/w ZHZ

NOV 28 1989 Marsden motion denied - ZHZ.

THIS COMPLAINT, CASE NUMBER A481636,  
CONSISTS OF 1 COUNT(S).

The undersigned swears that he/she is a peace officer for the State of California and that as part of his/her official duties has read and is thoroughly familiar with all aspects of the criminal complaint attached hereto and incorporated herein and that the facts and information set forth in this complaint and in the accompanying documents are true to the best of the undersigned's information and belief and establish probable cause for the issuance of a warrant of arrest for the defendant(s) LEE ROBBINS.

/s/ A.E. Cox  
Affiant/Officer

Subscribed and sworn before me on March 20, 1989, at Bellflower, County of Los Angeles, California, and it

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appearing to the Court that probable cause exists for the issuance of a warrant of arrest for the above named defendant(s), the warrant is so ordered.

/s/ Joseph A. [Illegible]  
Judge of the above entitled Court

IRA REINER, DISTRICT ATTORNEY

BY: /s/ Paul M Rugnetta by  
[Illegible]  
PAUL M RUGNETTA,  
DEPUTY

AGENCY: LASD HOMI DETS

I/O: COX    ID NO:

PHONE NO: 213-9744341

DR NO: 088-41230    OPERATOR: nso

PRELIM. TIME EST.:

DEFENDANT ROBBINS, LEE

CII NO. A08872715

DOB 8/10/50

BOOKING NO. \_\_\_\_\_

BAIL RECOM'D NO BAIL

CUSTODY R'TN DATE

FELONY COMPLAINT - ORDER HOLDING TO  
ANSWER - P.C. SECTION 872

It appearing to me from the evidence presented that the following offense(s) has/have been committed and that

App. 4

there is sufficient cause to believe that the following defendant(s) guilty thereof, to wit:

(Strike out or add as applicable)

LEE ROBBINS

<u>COUNT NO.</u>	<u>CHARGE</u>	<u>SPECIAL ALLEGATION</u>
1	PC187(A)	PC12022.5A/ 1203.06A1
2	487[3]	
3	487[3] - Dism	
4	10851 - Dism	

I order that defendant(s) be held to answer therefor and be admitted to bail in the sum of:

LEE ROBBINS

No bail Dollars

and be committed to the custody of the Sheriff of Los Angeles County until such bail is given. Date of arraignment in Superior Court will be:

[SEAL]

LEE ROBBINS

at: 9:00 A.M.

12-19-89 in Dept: J

Date: DEC 5 1989

/s/ [Illegible]

Committing Magistrate

App. 5

[Handwritten Originally]

LEE ROBBINS  
441 BAUCHET ST.  
LOS ANGELES CA 90012  
IN PROPRIA PERSONA

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF LOS ANGELES

PEOPLE OF THE STATE  
OF CALIFORNIA

PLAINTIFF

V.

LEE ROBBINS

DEFENDANT

CASE NO. A481636  
MOTION FOR  
APPOINTMENT OF  
ADVISORY COUNSEL  
AND/OR ALTERNATIVES  
THEREOF

FILED MAY 02 1990  
FRANK S. ZOLIN,  
COUNTY CLERK  
BY DONALD BROSTOFF,  
DEPUTY

COMES NOW THE DEFENDANT, LEE ROBBINS IN PROPRIA PERSONA, TO MOVE THIS COURT ON THE \_\_\_ DAY OF \_\_\_ 1990 OR AS SOON THEREAFTER AS THE MATTER CAN BE HEARD FOR AN ORDER APPOINTING ADVISORY COUNSEL AND OR ALTERNATIVES THEREOF.

MOTION IS MADE ON THE GROUNDS OF NEEDED EFFECTIVE ASSISTANCE OF COUNSEL AS PROVIDED FOR UNDER THE SIXTH AMENDMENT OF THE UNITED STATES AND CALIFORNIA CONSTITUTION.

DEFENDANT RELIES ON THIS MOTION, THE WITHIN DECLARATION OF DEFENDANT INCLUDING



MEMORANDUM OF POINTS AND AUTHORITIES,  
AND ANY AND ALL EVIDENCE, WHETHER ORAL OR  
DOCUMENTARY, BROUGHT FORTH AT TIME OF  
HEARING IN SUPPORT THEREOF.

EXECUTED THIS \_\_\_\_ DAY OF \_\_\_\_ 1990 IN THE  
COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

RESPECTFULLY SUBMITTED

/s/ Lee Robbins  
IN PROPRIA PERSONA

STATE OF CALIFORNIA	)	DECLARATION OF
COUNTY OF LOS	)	DEFENDANT
ANGELES	)	INCLUDING
	)	MEMORANDUM OF
	)	POINTS AND
	)	AUTHORITIES

I LEE ROBBINS, DO DECLARE UNDER PENALTY  
OF PERJURY THAT THE FOLLOWING AND ALL CON-  
TAINED WITHIN, AND OR REFERRED THERE TO, IS  
TRUE AND FACTUAL TO THE BEST OF MY BELIEF  
AND KNOWLEDGE.

THAT I AM THE DEFENDANT IN THIS CRIMINAL  
MATTER, IN PROPRIA PERSONA. THAT THE PRESENT  
OFFENSE CHARGED BY INFORMATION AGAINST  
DEFENDANT IS OF A FELONY NATURE, IN WHICH IF  
CONVICTED, DEFENDANT FACES PUNISHMENT OF  
IMPRISONMENT.

DEFENDANT CONTENTS AND BELIEVES THAT  
SINCE HIS CONSTITUTIONAL RIGHT TO PROCEED IN  
PROPRIA PERSONA WAS GRANTED BY THE COURT

HE HAS IN GOOD FAITH, DILIGENTLY SOUGHT TO  
RESEARCH, INVESTIGATE, PREPARE AND SUBMIT  
DEFENSE MOTIONS IN PREPARATION FOR TRIAL IN  
THIS MATTER.

DEFENDANT FURTHER BELIEVES THAT THERE  
EXISTS NUMEROUS DEFENSES AVAILABLE THAT  
HAVE YET TO BE INVESTIGATED AND RESEARCHED  
IN THIS MATTER.

DEFENDANT UPON REVIEWING THE INVESTI-  
GATION, RESEARCH AND PREPARATION ACCOM-  
PLISHED AND THAT YET TO BE PERFORMED,  
BELIEVES EMPHATICALLY THAT ADVISORY COUN-  
SEL IS NECESSARY TO ASSIST THE DEFENDANT IN  
CORRELATING THE COMPILED WORK PRODUCT  
INTO A VIABLE DEFENSE STRATEGY AND PRESEN-  
TATION. THAT IN ORDER TO ACCOMPLISH SUCH, IN  
A PROPER, CONCISE, TIMELY AND VIABLE MANNER,  
IN ACCORDANCE WITH COURT RULES AND PRO-  
CEDURE, TO INSURE THAT (IN BETTER INTEREST TO  
THE COURT) A FAIR AND JUST TRIAL IN ACCOR-  
DANCE WITH DUE PROCESS, THAT ADVISORY  
COUNSEL BE APPOINTED IN THIS MATTER.

YALE LAW REVIEW (1986) THE JAILED PRO PER  
DEFENDANT AND THE RIGHT TO PREPARE A  
DEFENSE.

THE LAW LIBRARY WAS FOUND TO BE INADE-  
QUATE BACK IN 1975 AND HASN'T BEEN UPDATED  
SINCE. BROWN V. PITCHESS 13 CAL. 3d 518, 520-531  
P2d 772, 773-74 119 CAL RPTR. 204, 205-06 (1975) 28  
USCA 1343(3)

THE STATE CAN NOT PREVENT A JAILED PRO PER DEFENDANT FROM PREPARING HIS DEFENSE MERELY BECAUSE HE HAS CHOSEN TO EXERCISE HIS CONSTITUTIONAL RIGHT OF SELF REPRESENTATION, BECAUSE SUCH CONSEQUENCES IMPLEMENTED BY THE COURT WOULD RENDER THE PROCEEDINGS TO BE NOTHING MORE THAN A EMPTY FORMALITY AND A MOCKERY OF JUSTICE.

ALTHOUGH THIS NOTE CONCENTRATES ON A DUE PROCESS RIGHT TO AN ADEQUATE OPPORTUNITY TO PREPARE, IT MIGHT ALSO BE ARGUED THAT SIXTH AMENDMENT RIGHTS TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION, TO BE CONFRONTED WITH WITNESSES AND TO HAVE A COMPULSORY PROCESS FOR OBTAINING WITNESSES - BY IMPLICATION - INCLUDE THE RIGHT TO THE PREPARATION NECESSARY TO EXERCISE THESE RIGHTS.

PEOPLE V. MERSINO, 237 CAL APP 2d 265, 268-69 46 CAL RPTR. 821, 824

#### FARETTA AND THE OPPORTUNITY TO PREPARE A DEFENSE

KINNEY V. LENON 425 F2d 209

UNITED STATES V. POMEROY 485 F2d 272 (1973)

UNITED STATES V. TRAPNELL 512 F2d 10, 12

BROOKS V. TEXAS 381 F2d 619 (1967)

MAJORITY AND DISSENTERS AGREE THAT THE STATE WITH IT'S ADVANTAGES OVER THE ACCUSED,

MUST ACT IN A RESPONSIBLE MANNER SO THAT THE PUBLIC FAITH IN THE CRIMINAL PROCESS IS NOT IMPERILED.

EACH OF THESE CONCERNS IS FLOUTED WHEN A PRO PER DEFENDANT WHO HAS BEEN UNABLE TO PREPARE AN ADEQUATE DEFENSE BECAUSE OF PRETRIAL INCARCERATION CONFRONTS THE ADVERSARY PROCESS. AN ACCUSED WHO CANNOT RESEARCH A CHARGE AGAINST HIM CANNOT PRESENT HIS BEST DEFENSE BECAUSE HE HAS NO WAY OF DISCOVERING WHAT POSSIBLE DEFENSES EXIST. A DEFENDANT WHO HAS BEEN RESTRAINED FROM INTERVIEWING WITNESSES AND CONDUCTING AN INVESTIGATION HAS LITTLE CHANCE TO PRESENT ANY DEFENSE AT ALL, LET ALONE HIS BEST DEFENSE.

IT WOULD BE DIFFICULT FOR AN INCARCERATED DEFENDANT TO BE PREVENTED BY THE STATE FROM ACQUIRING THE RUDIMENTARY KNOWLEDGE HE NEEDS IN ORDER TO PRESENT HIS CASE. AS FOR THE RESPECT FOR THE DEFENDANTS FREEDOM OF CHOICE, SUCH RESPECT IS MOCKED WHEN THE CHOICE OFFERED IS BETWEEN REPRESENTATION BY COUNSEL AND THE INABILITY TO PREPARE A DEFENSE. FINALLY THE GREATEST STRAIN ON THE ADVERSARY PROCESS MAY BE EXPECTED FROM DEFENDANTS WHO ARE NOT ONLY UNSKILLED AND UNLEARNED BUT ALSO UNABLE TO PREPARE. IN SHORT THE CONCERNS ANIMATING FARETTA SEEM LIFELESS WHEN A JAILED PRO PER DEFENDANT IS DENIED THE OPPORTUNITY TO PREPARE HIS DEFENSE.

- ADVISORY COUNSEL AS A SOLUTION -  
 - THE ROLE OF ADVISORY COUNSEL -

A SOLUTION TO THIS DILEMMA IS SUGGESTED IN FARETTA BOTH IN THE MAJORITY OPINION, AND IN THE CHIEF JUSTICES DISSENT, THE APPOINTMENT OF ADVISORY COUNSEL WOULD SAFEGUARD THE ACCUSED'S CONSTITUTIONAL RIGHT TO PREPARE:

ADVISORY COUNSEL WOULD BE AVAILABLE TO ADVISE THE PRO PER WITH/ON MATTERS OF LAW, TO CONDUCT LEGAL RESEARCH, TO PROVIDE THE PRO PER WITH LEGAL MATERIALS THAT CAN BE REASONABLY PROCURED, TO ARRANGE FOR THE INTERVIEW OF WITNESSES, TO INTERVIEW WITNESSES HIMSELF IF THEY CANNOT BE INTERVIEWED BY THE DEFENDANT AND TO CONDUCT FACTUAL INVESTIGATIONS, IN BRIEF ADVISORY COUNSELS' DUTY WOULD BE TO MAKE ALL PREPARATIONS NECESSARY FOR A DEFENSE THAT THE DEFENDANT, BECAUSE OF HIS INCARCERATION, IS PREVENTED FROM MAKING.

RESPECTIVELY THE APPOINTMENT OF ADVISORY COUNSEL IS A WELL ESTABLISHED PRACTICE COMMON IN MANY JURISDICTIONS.

UNITED STATES V. HARBOLT 491 F2d 78, 80 N2 (5TH CIR 1974)

UNITED STATES V. SPENCER 439 F2d 1047, 1051 (2ND CIR 1971)

PEOPLE V. PILGRIM 160 CAL APP 2d 528, 530 325 P2d 143, 144 (1958)

THERE IS HOWEVER SOME AUTHORITY FOR THE PROPOSITION THAT THE SIXTH AMENDMENT IN

GUARANTEEING THE ASSISTANCE OF COUNSEL ENVISAGES COUNSEL WHO IS TRULY AN ASSISTANT, AND WHOSE SERVICES MAY BE ACCEPTED OR REJECTED TO THE EXTENT DESIRED BY THE DEFENDANT, EVEN IF HE HAS INSISTED UPON EXERCISING THE RIGHT TO SELF-REPRESENTATION, THE SERVICES OF ADVISORY COUNSEL IF HE DESIRES SO. WADE V. BARKER 514 SW2d 692, 693 (KY 1974) \*SEE NOTE SELF REPRESENTATION IN CRIMINAL TRIALS, THE DILEMMA OF THE PRO PER DEFENDANT 59 CAL L.REV. 1479, 1507-12 (1971) \*NOTE THE PRO PER DEFENDANTS RIGHT TO COUNSEL 41 U. CIN. L. REV. 927, 929-30 (1972)

ADVISORY COUNSEL ALLOWED TO PARTICIPATE IN TRIAL ON SEVERAL OCCASIONS. DUKE V. UNITED STATES 255 F2d 721, 726 (9TH CIR.) CERT. DENIED 357 U.S. 920 (1958)

THE RIGHT TO AN ADEQUATE OPPORTUNITY TO PREPARE DOES NOT GUARANTEE THAT A PRO PER DEFENDANT BE ALLOWED TO PICK AND CHOOSE BETWEEN VARIOUS POSSIBLE MEANS OF PREPARING A DEFENSE, BUT ONLY THAT IF THE STATE BY JAILING A PRO PER DEFENDANT BEFORE TRIAL, RESTRICTS THAT DEFENDANTS' TRIAL PREPARATION IT MUST PROVIDE ALTERNATIVE MEANS OF PREPARING A DEFENSE.

UNITED STATES V. BENNETT 539 F2d 45

SAPIENZA V. VINCENT 534 F2d 1007

PRO PER DEFENDANTS OFTEN WASTE THEIR EFFORTS ON FILING A FLURRY OF MOTIONS RATHER THAN PREPARING FOR THE TRIAL ITSELF



AND ADVISORY COUNSEL WILL BE MORE EFFECTIVE AND EFFICIENT IN PREPARING A DEFENSE THAN LAW STUDENTS OR PARA PROFESSIONALS, BY GUIDING A DEFENDANTS PREPARATION FOR TRIAL, SUGGESTING POSSIBLE DEFENSES, COORDINATING DEFENSE THEORIES WITH FACTUAL INVESTIGATIONS, AND PROVIDING THE DEFENDANT WITH KNOWLEDGE ESSENTIAL IN ORDER TO MAKE AN ADEQUATE PRESENTATION OF HIS CASE. ADVISORY COUNSEL MAY BE EXPECTED TO IMPLEMENT ONE OF THE FARETTA DECISIONS BASIC CONCERNS: THAT THE ACCUSED HAVE THE OPPORTUNITY TO PRESENT HIS BEST DEFENSE. DESPITE OFTEN REPEATED WARNING BY COURTS THAT A PRO PER DEFENDANTS IGNORANCE OF LAW AND PROCEDURE OFTEN FORCES THE COURT TO ASSUME A MORE ACTIVE POSTURE ON THE PRO PER'S BEHALF, GUIDING HIM IN PRE-TRIAL HEARINGS.

PROFESSIONAL ETHICS AND JUDGMENT HOWEVER ARE NOT TO BE EXPECTED FROM THE JAILED PRO PER DEFENDANT, IN ADDITION APPLICATION THROUGH ADVISORY COUNSEL RELIEVES THE DEFENDANT FROM HAVING TO REVEAL POTENTIALLY DAMAGING INFORMATION TO THE COURT IN ORDER TO SUPPORT REQUESTS FOR COROLLARY SERVICES. TO DEPRIVE AN INDIGENT PRO PER DEFENDANT OF SERVICES OF INVESTIGATORS, PSYCHIATRISTS, AND OTHER EXPERTS, WHILE PROVIDING SUCH SERVICES TO INDIGENT DEFENDANTS REPRESENTED BY COUNSEL, SEEMS AN UNFAIR DISCRIMINATION.

THE PURPOSE OF THE CRIMINAL JUSTICE ACT IS TO GUARANTEE THE CRUCIAL RIGHTS OF AN INDIGENT TO REASONABLY FAIR EQUITY WITH THOSE WHO HAVE ADEQUATE FINANCIAL MEANS TO PROTECT THEIR RIGHT. INDEED THERE IS SOME AUTHORITY TO SUPPORT THE ARGUMENT THAT AN INDIGENT CRIMINAL DEFENDANT HAS A DUE PROCESS RIGHT TO COURT-APPOINTED EXPERTS, MUST HAVE ACCESS TO MINIMAL DEFENSE AIDE, ESPECIALLY IMPORTANT TO A PRO PER DEFENDANT WHO IS PREVENTED BY INCARCERATION FROM CONDUCTING A FACTUAL INVESTIGATION.

UNITED STATES V. THERIAULT 440 F2d 713, 717 (5TH CIR 1971) CERT DENIED 411 U.S. 984 (1973)

UNITED STATES V. BASS 477 F2d 723 (9TH CIR. 1973)

UNITED STATES V. HARTFIELD 513 F2d 254, 258 (9TH CIR 1975)

NO. 864 88TH CONG. 1ST SESS. 5 (1963) REPRINTED IN (1964) U.S. CODE CONG. AND AD NOTED 2990

(PRESIDENT KENNEDYS LETTER TRANSMITTING PROPOSED ACT)

"SIXTH AMENDMENT RIGHTS OF ACCUSED IN ALL CRIMINAL PROSECUTIONS ARE TO . . . HAVE ASSISTANCE OF COUNSEL FOR HIS DEFENSE AS PART OF DUE PROCESS OF THE LAW" THAT IS GUARANTEED BY FOURTEENTH AMENDMENT TO DEFENDANTS IN THE CRIMINAL COURTS OF STATE. (FARETTA V. CALIFORNIA (1975) 422 U.S. 806, 95 SCT 2525 45 L.E.D. 2d 562)

DEFENDANT FURTHER CONTENTS THAT HE IS ENTITLED TO SUCH ASSISTANCE, WHEN IT APPEARS

THAT SUCH WILL PROMOTE JUSTICE AND EXPEDITE THE MATTER BEFORE THE COURT.

"LEGAL ASSISTANCE MEANS LEGAL COUNSEL AND SUPPORTIVE . . . OR ANY OTHER FORM OF SERVICES PROVIDED TO ASSIST THE DEFENDANT IN THE PREPARATION AND PRESENTATION OF THE DEFENDANTS CASE"

CALIF. PENAL CODE SEC. 987.8 (F)(i)

THE DUE PROCESS RIGHT OF EFFECTIVE COUNSEL INCLUDES THE RIGHT TO ANCILLARY SERVICES NECESSARY IN THE PREPARATION OF A DEFENSE. PEOPLE V. FAXELL (1979) 91 CA 3d 327, 154 CAL REPTR AT 134

BRUBAKER V. DICKSON (1962) 310 F2d 30

MASON V. STATE OF ARIZONA (1974) 504 F2d 1345

WATSON V. PATTERSON (1966) 358 F2d 297

IN THE ALTERNATIVE, DEFENDANT REQUESTS THAT COUNSEL BE APPOINTED TO REPRESENT DEFENDANT AND THAT DEFENDANT BE HELD AS CO-COUNSEL WITH COURT-ORDERED PRO PER STATUS IN THAT DEFENDANT HAS AND CONTINUES TO PERFORM IN A DILIGENT MANNER THE RESEARCH AND PREPARATION THAT MAY AND/OR WILL PROVIDE A EFFICABLE DEFENSE THAT MAY NOT BE EFFECTIVELY PERFORMED BY SUCH COUNSEL WITHOUT DEFENDANT HAVING CO-COUNSEL CAPACITY WITH ACCOMPANYING PRO PER STATUS.

-CONCLUSION-

A JAILED PRO PER DEFENDANT IS USUALLY GRANTED LITTLE OPPORTUNITY TO PREPARE HIS

DEFENSE. YET AN ADEQUATE OPPORTUNITY TO PREPARE IS A FUNDAMENTAL COMPONENT OF A FAIR TRIAL. THE JAILED PRO PER DOES THEN PRESENT A STRIKING CASE OF CONFLICT BETWEEN FARETTAS' SIXTH AMENDMENT RIGHT OF SELF REPRESENTATION AND THE DUE PROCESS RIGHT TO A FAIR TRIAL.

THIS NOTE HAS SUGGESTED A MEASURE TO SMOOTH THE EDGES OF THAT CONFLICT, THE APPOINTMENT OF ADVISORY COUNSEL.

PERHAPS IN TRUTH, NO JAILED PRO PER DEFENDANT CAN EXPECT A TRIAL AS FULL AND FAIR AS THE TRIAL OF THOSE IN JAIL WHO ARE REPRESENTED BY COUNSEL.

APPOINTMENT OF ADVISORY COUNSEL IS NOT A PRO PER DEFENDANTS PENACEA, BUT IF PRETRIAL INCARCERATION DEPRIVES A PRO PER DEFENDANT OF ALL OTHER OPPORTUNITIES TO PREPARE A DEFENSE - THEN DUE PROCESS REQUIRES NO LESS.

THEREFORE DEFENDANT MOVES THIS COURT TO GRANT THIS MOTION IN PERTINENT PART OR AS SOUGHT BY THE ALTERNATIVES HEREIN.

EXECUTED THIS \_\_\_\_ DAY OF \_\_\_\_ 1990 IN THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA.

RESPECTFULLY SUBMITTED

/s/ Lee Robbins  
IN PROPRIA PERSONA

(PC 1258)

[Handwritten Originally]

IN THE SUPERIOR COURT OF CALIFORNIA,  
IN AND FOR THE COUNTY OF LOS ANGELES

LEE ROBBINS,	) CASE # A481636
PETITIONER,	) PETITION FOR WRIT
-VS-	) OF MANDATE/
SUPERIOR COURT OF THE	) PROHIBITION [CODE
STATE OF CALIFORNIA	) OF CIVIL PROCEDURE
COUNTY OF LOS ANGELES	) SECTION 1085, 1086,
RESPONDANT	) ETC. SEQ.]
	) FILED MAY 02 1990
	) FRANK S. ZOLIN,
	) COUNTY CLERK
	) BY DONALD
	) BROSTOFF, DEPUTY

PEOPLE OF THE STATE OF CALIFORNIA,  
REAL PARTY IN INTEREST

1. PETITIONER IS THE DEFENDANT IN A CRIMINAL ACTION ENTITLED PEOPLE OF THE STATE OF CALIFORNIA -VS- LEE ROBBINS CASE NUMBER A481636, NOW PENDING BEFORE THE RESPONDENT COURT

2. RESPONDENT IS THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

3. THE REAL PARTY IN INTEREST IS THE PEOPLE OF THE STATE OF CALIFORNIA

4. RESPONDENT HAS A CLEAR PRESENT AND MINISTERIAL DUTY TO ABIDE BY AND ADHERE TO THE EXERCISE OF SOUND DISCRETION GOVERNED BY LEGAL RULES TO DO JUSTICE ACCORDING TO THE LAWS IN CONDUCTING HEARING, RECEIVING

EVIDENCE, AND TO ISSUE RULINGS CONSISTENT WITH LAWS GOVERNING THE SUBJECT OF THIS PETITION.

5. RESPONDENT HAS FAILED AND/OR REFUSED TO EXERCISE SOUND DISCRETION AS FOLLOWS;

(A) ON OR ABOUT APRIL 16, 1990 PETITIONER DID PRESENT BEFORE RESPONDENT A MOTION ENTITLED, REQUEST FOR ADVISORY COUNSEL

(B) ON OR ABOUT APRIL 16, 1990 RESPONDENT DID DENY PETITIONERS MOTION DESPITE FACTS BROUGHT BEFORE THE COURT AND THE STATE OF EXISTING LAW BOTH OF WHICH SUPPORT PETITIONERS REQUEST.

6. PETITIONER IS A PERSON BENEFICIALLY INTERESTED IN THIS PROCEEDING AND PETITIONER, RESPONDENT, AND REAL PARTY IN INTEREST ARE THE PARTIES WHO WILL BE EFFECTED BY THIS PROCEEDING.

7. PETITIONER HAS NO PLAN SPEEDY AND ADEQUATE REMEDY IN THE ORDINARY COURSE OF LAW OTHER THAN BY THIS PETITION IN THAT THERE IS NO OTHER ADEQUATE PROCEDURE TO REQUIRE RESPONDENT TO USE DISCRETION GOVERNED BY LEGAL RULES TO DO JUSTICE ACCORDING TO THE MANDATE OF LAW AND THE CONSTITUTION, OR TO OTHERWISE ENTITLE PETITIONER TO ENJOY THE BENEFIT SOUGHT THROUGH THIS PETITION.

8. PETITIONER HAS PERFORMED ALL CONDITIONS PRECEDENT TO THE FILING OF THIS



PETITION BY HAVING FIRST EXHAUSTED ALL AVAILABLE REMEDIES

9. AT ALL TIMES MENTIONED HEREIN, RESPONDENT HAS BEEN ABLE TO ADHERE TO AND FOLLOW THE MANDATE LAW WHICH GOVERNS THE WITHIN SUBJECT MATTER. NOTWITHSTANDING SUCH ABILITY AND DESPITE PETITIONERS DEMAND(S) AS STATED HEREIN, RESPONDENT CONTINUES TO FAIL AND/OR REFUSE TO ORDER RELIEF PETITIONER SEEKS.

WHEREFORE PETITIONER PRAYS THAT: AN ALTERNATIVE WRIT OF PROHIBITION BE ISSUED, RESTRAINING RESPONDENT COURT FROM TAKING ANY FUTHER PROCEEDING IN THE CRIMINAL ACTION AGAINST PETITIONER NOW PENDING IN RESPONDENT COURT AND ENTITLED, PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF -VS- LEE ROBBINS DEFENDANT, CASE # A481636 UNTILL FURTHER ORDER OF THIS COURT.

(1A) THAT THIS COURT, ON HEARING THIS PETITIONER AND ON CONSIDERATION OF ANY RETURN FILED THERETO, ISSUE ITS PREFATORY WRIT OF MANDATE COMMANDING RESPONDENT TO; APPOINT REQUESTED ADVISORY COUNSEL

(1B) THE PETITIONER RESERVE THE COST OF THIS PROCEEDING AND SUCH OTHER RELIEF AS MAY BE JUST, PROPER, AND EQUITABLE.

DATED: MAY 2, 1990

RESPECTFULLY SUBMITTED

/s/ Lee Robbins  
PETITIONER IN PRO PER

VERIFICATION

I HAVE READ THE ABOVE STATEMENTS AND DO DECLARE UPON PENALTY OF PERJURY THAT THESE STATEMENTS ARE TRUE AND CORRECT AS BASED UPON MY INFORMATION AND BELIEF.

EXECUTED THIS 2ND DAY OF MAY, 1990 AT LOS ANGELES CALIFORNIA PURSUANT TO PROVISIONS OF THE CODE OF CIVIL PROCEDURE, SECTIONS 446. AND 2015.5.

/s/ Lee Robbins  
DECLARANT

MEMORANDUM OF POINTS AND AUTHORITIES

PETITIONER IS ENTITLED TO A WRIT OF MANDATE. A WRIT OF MANDATE MAY BE ISSUED TO ANY INFERIOR TRIBUNAL, CORPORATION, BOARD, OR PERSON TO COMPEL THE PERFORMANCE OF AN ACT WHICH THE LAW SPECIFICALLY ENJOINS SUCH AS A DUTY RESULTING FROM AN OFFICE, TRUST OR STATION. IT MAY ALSO ISSUE TO COMPEL THE ADMINISTRATION OF A PARTY TO THE USE AND ENJOYMENT OF RIGHT OR OFFICE TO WHICH HE IS ENTITLED, AND FROM WHICH HE IS UNLAWFULLY PRECLUDED BY SUCH INFERIOR TRIBUNAL, CORPORATION, BOARD, OR PERSON. CALIF. CODE OF CIVIL PROCEDURE, SEC. 1085

WRIT OF MANDATE SHOULD BE ISSUED TO COMPEL ADMISSION OF A PARTY TO THE USE OR ENJOYMENT OF A RIGHT TO WHICH A PARTY IS ENTITLED, BECAUSE PETITIONER DOES NOT HAVE A PLAN; SPEEDY OR ADEQUATE IN THE ORDINARY COURSE OF LAW AND PETITIONER IS BENEFIRIALLY INTERESTED, CODE OF CIVIL PROCEDURE, SECTION 1085 AND 1086

DISCRETION GRANTED TO A COURT BY STATUTE IS NOT AN ARBITRARY DISCRETION TO DO ABSTRACT JUSTICE ACCORDING TO THE POPULAR MEANING OF THAT PHRASE, BUT IS A DISCRETION GOVERNED BY LEGAL RULES TO DO JUSTICE ACCORDING TO THE LAW AND IS TO BE EXERCISED IN THE LIGHT OF ATTENDING CIRCUMSTANCES

IN EXERCISING IT'S DISCRETION A COURT IS TO BE GOVERNED BY THE BODY OF LAW DEFINING THOSE STANDARDS.

PEOPLE -VS- ARNOLD (1976) 50 CA 3d SUPP.1.

IN A LEGAL SENSE DISCRETION IS ABUSED WHENEVER IN THE EXERCISE OF THE DISCRETION THE COURT EXCEEDS THE BOUNDS OF REASON, ALL OF THE CIRCUMSTANCES BEFORE IT BEING CONSIDERED.

STATE FARM INC. -VS- SUPERIOR COURT, (1956) 47 C 2d 428, 432, 304, P2d 13

NATIONAL LIFE OF FLORIDA -VS- SUPERIOR COURT (1971) 21 CA 3d 281

SAN DIEGO WHLS. CREDIT -VS- SUPERIOR COURT (1966) 246 CA 2d 63,

WRIT OF MANDATE IS AVAILABLE TO CORRECT ABUSE OF DISCRETION. BALDWIN-LIME-HAMILTON -VS- SUPERIOR COURT, (1962) 208 CA 2d 803, 823.

WRIT OF MANDATE IS THE PROPER REMEDY IN THE OBSENT CASE AS THERE IS NO APPEAL PETITIONER CAN EXERCISE AND/OR ANY APPEAL AVAILABLE WILL NOT ALLOW TIMELY RESOLUTION OF THE CONTROVERSY REPRESENTED IN THIS SECTION WINTON -VS- MUNICIPAL COURT (1975) 48 CA 3d 228 RUNNING FRENCH CORPORATION -VS- SUPERIOR COURT (1975) 51 CA 3d 400

PEHLAN -VS- MUNICIPAL COURT (1950) 35 C 2d 363, 217 P.2d 957

PETTIS -VS- MUNICIPAL COURT (1970) 12 CA 3d 1029 THE EXERCISE OF JURDICTION BY A COURT IN A MANDATE PROCEEDING REST TO A CONSIDERABLE EXTENT IN THE WISE DISCRETION OF THE COURT. WHEELRIGHT -VS- MARIN COUNTY (1970) 2C 3d 448, 467 P.2d 537, APPEALED DISMISSED, CERT, DENIED, 404 U.S. 807 915 CT. 65, 27, L.ED. 2d 37.

THUS A COURT MAY DENY RELIEF TO A PETITIONER WHERE THE PERSONS RIGHTS ARE OTHERWISE PROTECTED BARTHAQLOMNE OIL CORP. -VS- SUPERIOR COURT (1941) 18 C.2d 726, 730, 117 P2d 674.

HOWEVER, WHERE A PETITIONER SHOWS COMPLIANCE WITH THE REQUIREMENTS FOR THE ISSUANCE OF A PREMPTORY WRIT, THE COURT HAS NO DISCRETION TO EXERCISE AND MUST ISSUE THAT WRIT, AS A MATTER OF RIGHT. FLORA CRANE SERVICE INC. -VS- ROSS (1964) 61 C.2d 199, 203 390 P.2d 193.

MAY -VS- BOARD OF DIRECTORS (1949) 34 C.2d 125, 133-134, 208 P.2d 661

PETITIONER HAS A CLEAR, PRESENT, AND BENEFICANT RIGHT TO THE PERCARIOUS OF THE RESPONDENT'S DUTY TO OBEY STATE AND FEDERAL LAW. THEREFORE THE PETITION IS NECESSARY TO ENFORCE AND PROTECT PETITIONERS LEGAL RIGHTS TO BE FREE FROM ARBITRARY AND ILLEGAL ACTION OF RESPONDENT. AMERICAN FRIENDS SERVICE COMMITTEE -VS- PROCURDLER, (1973) 33 CA 3d 252, 256.

A WRIT OF MANDATE IS ALSO PROPER TO COMPELL A GOVERNMENTAL OFFICIAL TO PERFORM A MINISTERIAL ACT, CALIFORNIA EDUCATION FACILITIES AUTHORITY -VS- PRESIDENT, (1964) 61 C2d, 593, 598, 526 P2d 513

FBRA GRAVE SERVICE INC. -VS- ROSS, (1964) 61 C.2d 190, 204 390 P2d 193. FINALLY A WRIT OF MANDATE IS PROPER WHEN THE ACTION TAKEN BY AN OFFICIAL IS SO PALPABLE UNREASONABLE AND ARBITRARY AS TO INDICATE THAT IT HAS ABUSED IT'S DISCRETION AS A MATTER OF LAW SANDRA -VS- LOS ANGELES (1970) 3C.2d 252, 266, 475 P.2d 201

PETITIONER HAS A BENIFICIAL INTEREST AS DESCRIBED IN THE PETITION, AND WRIT IS NECESSARY TO PROTECT THE SUBSTANTIAL RIGHTS OF PETITIONER, AS ALLEGED IN THIS PETITION, SUBSTANTIAL DAMAGE WILL BE SUFFURED IF THE WRIT IS DENIED.

CONCLUSION

FOR THE REASONS SET FORTH HEREIN, BUT NOT TO LIMIT THERETO, THE PETITION MUST BE GRANTED.

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App. 24

[Handwriting In Italics]  
IN THE  
COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION: 4

COURT OF APPEAL - SECOND DIST.  
FILED JAN 30 1991  
ROBERT N. WILSON CLERK  
V. THOMAS DEPUTY CLERK

FEB 02 1991  
*To File*

RE: PEOPLE OF THE STATE OF CALIFORNIA  
VS.  
ROBBINS, LEE  
2 CRIMINAL B054733  
LOS ANGELES NO. A481636

THE COURT:

PURSUANT TO APPELLANT'S REQUEST FOR  
APPOINTMENT OF COUNSEL AND UNDER THE  
AUTHORITY OF PENAL CODE SECTION 1240, SUBDI-  
VISION (A) (1) DAVID H. GOODWIN, IS APPOINTED  
COUNSEL FOR APPELLANT ON THIS APPEAL.

THE COUNTY CLERK IS DIRECTED TO FORWARD  
DEFENDANT/APPELLANT'S COPY OF THE RECORD  
ON APPEAL TO CALIFORNIA APPELLATE PROJECT,  
INC., UPON ITS COMPLETION. APPELLANT'S OPEN-  
ING BRIEF SHALL BE FILED WITHIN FORTY DAYS  
FROM THE DATE OF THE FILING OF THE RECORD  
ON APPEAL IN THIS COURT.

App. 25

APPELLANT IS DIRECTED TO KEEP THIS COURT  
INFORMED OF HIS MAILING ADDRESS AT ALL  
TIMES. IF YOU MOVE, YOU MUST NOTIFY THE CLERK  
OF THIS COURT IMMEDIATELY; OTHERWISE YOU  
MAY NOT RECEIVE IMPORTANT NOTICES CONCERN-  
ING YOUR APPEAL.

WOODS, P.J.  
PRESIDING JUSTICE

ATTORNEY ADDRESS:

DAVID H. GOODWIN  
P.O. BOX 93579  
LOS ANGELES, CA. 90093 579

APPELLANT'S ADDRESS:

LEE ROBBINS E69926  
CALIFORNIA MEDICAL FACILITY  
P. O. BOX 2000  
VACAVILLE, CA. 95696

CC CALIFORNIA APPELLATE PROJECT, INC.

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**APPENDIX B**  
**CORRECTED PAGES OF THE JOINT APPENDIX**

**Corrected page 68**

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<sup>2</sup>Because we conclude that the district court correctly identified at least two arguably nonfrivolous issues, we need not determine whether other arguably nonfrivolous issues exist.

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**Corrected page 85**

[3] \* \* \* Appointed counsel must either provide active and vigorous appellate representation of indigent criminal defendants or, after conducting a conscientious examination of the record and concluding that any appeal would be wholly frivolous, request leave to withdraw and file a brief identifying anything in the record that might arguably support an appeal. *See Anders*, 386 U.S. at 744; *see also Penson*, 488 U.S. at 80, 83-84.

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**Corrected pages 140-41**

MR. FAGAN: YOUR HONOR, I HAVE RECEIVED THE DISCOVERY MOTION. I HAVE REVIEWED IT AND I WOULD CONCEDE THAT THE DEFENDANT IS ENTITLED TO EVERYTHING THAT IS REQUESTED IN THE DISCOVERY MOTION.

I WOULD INDICATE FOR THE RECORD AT THIS POINT IN TIME I HAVE GIVEN MR. SEIFER EVERYTHING THAT I HAVE THAT WOULD BE COVERED IN THE DISCOVERY MOTION.

ADDITIONALLY, FOR THE RECORD, I AM SEEKING SOME ADDITIONAL INVESTIGATION THAT I HAVE NOT RECEIVED YET; AND AT SUCH TIME THAT I DO, I WILL PROVIDE A COPY TO MR. SEIFER.

THE COURT: VERY WELL.

MR. SEIFER: I ACCEPT THAT REPRESENTATION COMPLETELY, YOUR HONOR. THAT'S FINE.

THE COURT: WITH THAT ON THE RECORD, IT WOULD SEEM TO ME THAT THAT MATTER HAS BEEN DULY RESOLVED.

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**Corrected pages 196-97**

AND WHILE YOU MAY NOT BELIEVE THAT MR. SEIFER AGREES WITH YOUR THEORY OF THE CASE, WHILE YOU MAY BELIEVE THAT MR. SEIFER TACTICALLY WANTS TO DO THINGS OR NOT TO DO THINGS THAT YOU WANT HIM TO DO OR NOT DO, DOESN'T MEAN THAT THE TWO OF YOU AT LEAST AREN'T TALKING, THAT YOU ARE NOT ABLE TO SIT DOWN AND DISCUSS THE THING EVEN THOUGH YOU ARE NOT COMING TO AN AGREEMENT.

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Corrected pages 268-71 [handwritten originally]

LEE ROBBINS  
441 BAUCHET ST.  
LOS ANGELES, CA.  
90012

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF LOS ANGELES

PEOPLE OF THE	)	CASE #A481636
STATE OF	)	NOTICE OF MOTION
CALIFORNIA	)	FOR CONTINUANCE,
	)	DECLARATION IN
PLAINTIFF	)	SUPPORT OF MOTION
	)	
-V-	)	Filed JUL 06, 1990
LEE ROBBINS	)	FRANK S. ZOLIN,
	)	COUNTY CLERK
DEFENDANT	)	BY B. SMITH, DEPUTY

TO: THE DISTRICT ATTORNEY OF LOS ANGELES COUNTY, PLEASE TAKE NOTICE THAT ON JULY 6, 1990 AT 9 AM IN DEPT "P", DEFENDANT LEE ROBBINS WILL MOVE THE COURT TO GRANT A CONTINUANCE OF THE TRIAL NOW SET FOR JULY 6, 1990, AND THAT THE CONTINUANCE BE FOR A PERIOD OF NOT LESS THAN 45 CALENDAR DAYS.

THIS MOTION IS BASED ON THIS NOTICE, THE PLEADINGS, FILES AND RECORDS IN THIS ACTION, THE DECLARATION AND MEMORANDUM OF POINTS AND AUTHORITIES FILED IN SUPPORT OF

THIS MOTION, AND ON EVIDENCE THAT MAY BE ADDRESSED AT THE HEARING ON THE MATTER.

DATED: JUNE 28, 1990

/s/ Lee Robbins  
DEFENDANT PRO PER

DECLARATION IN SUPPORT OF  
MOTION FOR CONTINUANCE

I, LEE ROBBINS, DO HEREBY DECLARE:  
THAT THIS CASE IS PRESENTLY SET FOR JULY 6, 1990 IN DEPT "P" OF NORWALK SUPERIOR COURT; THAT A CONTINUANCE OF THE TRIAL FOR AT LEAST 45 CALENDAR DAYS IS NECESSARY BECAUSE;

DUE TO THE COMPLEXITY OF THIS CAPITAL CASE, DEFENDANTS LACK OF SKILL, RESOURCES, CO-COUNSEL, OR ADVISORY COUNSEL, THE DEFENDANT WILL REQUIRE THE ADDITIONAL REQUESTED TIME TO ADEQUATELY PREPARE.

PEO -V- HILL (1983) 48 CA 3D 744, 758, 196 CR 382, 391. PRO PER DEFENDANTS MOTION FOR CONTINUANCE TO PREPARE FOR TRIAL DENIED, CASE REVERSED BECAUSE DEFENDANT DENIED HIS RIGHT TO EFFECTIVE REPRESENTATION.

THE RIGHT TO COUNSEL, U.S. CONST. ART. VI: CAL. CONST. ART. I § 15 INCLUDES THE RIGHT TO ADEQUATELY PREPARE A DEFENSE.

PEO -V- MADDOX (1967) 67 C2d 647, 652 63 CR 371, 374. INCLUDING THE RIGHT TO PREPARE, ARGUE MOTIONS AND OBJECTIONS BEFORE, DURING, AND AFTER TRIAL.



COOPER -V- SUP. CT. (1961) 55 C2d 291, 302, 10 CR 842, 849

PEO -V- SARAZZAWSKI (1945) 27 C2d 7, 17, 161 P2d 934, 939

THE COURT HAS DISCRETION TO PERMIT AN INDIGENT DEFENDANT AN ATTORNEY ADVISOR AND MAY HAVE A DUTY TO APPOINT ADVISORY COUNSEL IF IT DETERMINES THAT DEFENDANTS WAIVER IS INTELLIGENTLY MADE BUT THAT DEFENDANT LACKS THE SKILL TO DEFEND THE CASE. PEO -V- BIGELOW (1984) 37 C3d 731, 742, 209 CR 328, 333. (ABUSE OF DISCRETION BY COURT TO APPOINT ADVISORY COUNSEL IN CAPITAL CASE.) A.C. 987.9 SUB(d), DRESCHER -V- SUP CT. (1990) 267 CR 661

THE DEFENDANT PRAYS THAT THE COURT IN ITS INFINITE WISDOM WILL ALLOW THE DEFENDANT THE OPPORTUNITY TO PREPARE AN ADEQUATE DEFENSE BY GRANTING MORE TIME, THE ASSISTANCE OF ADVISORY COUNSEL, FUNDS FOR A FORENSIC EXPERT, AND ADDITIONAL FUNDS FOR THE CONTINUING INVESTIGATION.

DEFENDANTS INVESTIGATOR NEEDS ADDITIONAL TIME & FUNDS TO COMPLETE HIS INVESTIGATION.

DEFENDANT REQUESTS FUNDS BE ALLOCATED FOR A FORENSIC EXPERT.

THE INVESTIGATORS FINDINGS ARE EXPECTED TO SHOW ADDITIONAL EVIDENCE CRUCIAL TO THE DEFENSE WHEN COUPLED WITH THE EXPERTS FINDINGS IN RECONSTRUCTING THE MURDER.

THE EXPERTS FINDINGS ARE EXPECTED TO DISPROVE THE PROSECUTORS CASE AND EXPEDITE THE TRIAL BY REMOVING ALL DOUBT AS TO THE DEFENDANTS INNOCENCE.

COUNSEL MUST SPECIFY THE TESTIMONY HE EXPECTS FROM A WITNESS. PEO -V- AH FAT (1874) 48 C 61, 63. THEN COUNSEL MUST SHOW THAT THIS TESTIMONY HAS A LEGITIMATE TENDENCY TO PROVE OR DISPROVE A FACT THAT COULD INFLUENCE THE DECISION IN THE CASE. PEO -V- DUNSTAN (1922) 59 CA 574, 584, 211 P 813, 817.

IF THE COURT WISHES MORE DETAILED INFORMATION RELATIVE TO THESE REQUESTS THE DEFENDANTS REQUESTS AN IN CAMERA HEARING  
PEO -V- CRUZ (1978) 83 CA3d 308, 324, 147 CR 740, 749.  
PEO -V- WORTHY (1980) 109 CA3d 514, 522 N2, 167 CR 402, 407 N2

- CONCLUSION -

THE DEFENSE REQUESTS:

ADDITIONAL TIME TO PREPARE;

FUNDS FOR APPOINTMENT OF FORENSIC EXPERT;

FUNDS FOR APPOINTMENT OF ADVISORY COUNSEL;

ADDITIONAL FUNDS FOR CONTINUING INVESTIGATION.

THE DEFENDANT PRAYS THAT THESE REQUESTS BE GRANTED, AND THAT THE COURT "SHALL BE GUIDED BY THE NEED TO PROVIDE A COMPLETE

AND FULL DEFENSE FOR THE DEFENDANT"  
PENAL CODE SEC 987.9

THE DEFENDANT IS WILLING TO WAIVE TIME FOR  
THE PURPOSE OF THESE REQUESTS.

EXECUTED THIS 28TH DAY OF JUNE 1990, AT LOS  
ANGELES CA.

I DECLARE UNDER PENALTY OF PERJURY THAT THE  
FORGOING IS TRUE AND CORRECT

/s/ Lee Robbins  
DEFENDANT PRO PER

**Corrected page 277**

13. If you answered "yes" to (12), list with respect to  
each petition, motion or application:

(a) The specific nature thereof:

I MOTION FOR ADVISORY COUNSEL, CO-  
COUNSEL OR

II IN THE ALTERNATIVE COUNSEL.

III \_\_\_\_\_

IV \_\_\_\_\_

**Corrected page 281**

18. If you answered "yes" to one or more parts of (17),  
list the name and address of each such attorney and  
the proceeding in which he appeared:

(a) Ralph Seifer Norwalk Public Defenders Office

**Corrected pages 295-96**

THE OTHER OFFICER THAT YOU HAVE ASKED  
FOR IS THE OFFICER WHO TOOK THE PHOTO-  
GRAPHS OF THE CRIME SCENE, JUST THE PHOTO-  
GRAPHER. THERE IS NO NECESSITY FOR HAVING  
THE PHOTOGRAPHER IN COURT, THAT I CAN SEE,  
BECAUSE OTHER OFFICERS THAT WERE THERE CAN  
SAY THESE WERE ACCURATE REPRESENTATIONS.

**Corrected page 334**

Within 30 days from the date of this order, appellant may  
submit by brief or letter any grounds of appeal, conten-  
tions, or arguments which appellant wishes this court to  
consider.

13  
No. 98-1037

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1998

Supreme Court, U.S.

**FILED**

~~JUL 30~~ 1999

OF THE CLERK

GEORGE SMITH, Warden,  
*Petitioner,*

vs.

LEE ROBBINS,  
*Respondent.*

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**REPLY BRIEF FOR PETITIONER**

BILL LOCKYER  
Attorney General  
of the State of California  
DAVID P. DRULINER  
Chief Assistant Attorney General  
CAROL WENDELIN POLLACK  
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PETITION FOR CERTIORARI FILED DECEMBER 17, 1998  
CERTIORARI GRANTED MARCH 8, 1999



No. 98-1037

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**ABBREVIATIONS KEY TO DOCUMENTS  
PRESENTED TO THE COURT**

A.G.A.C.	Amicus curiae brief filed by 15 state attorneys general in support of the Warden
App.	Appendix to Robbins's merits brief in this Court
C.A.A.C.	California Academy of Appellate Lawyers' amicus curiae merits brief in support of the Warden
C.J.A.C.	Criminal Justice Legal Foundation's amicus curiae merits brief in support of the Warden
C.T.	Clerk's transcript at trial
D.A.C.	Delgado's amicus curiae merits brief in support of Robbins
J.A.	Joint Appendix
J.A.C.	Retired appellate judges' amicus curiae merits brief in support of Robbins
N.A.C.	National Association of Criminal Defense Lawyers' amicus curiae brief in support of Robbins
R.B.	Robbins's opposition brief on the merits
Ret.	Warden's return in the United States District Court

R.O.C.	Robbins's opposition to the petition for writ of certiorari
R.T.	Reporter's transcript at trial
W.O.B.	Warden's opening brief on the merits
W.R.C.	Warden's reply to opposition to petition for writ of certiorari



## INTRODUCTION

Respondent Lee Robbins has filed a brief in which he argues that the Court should not reach the issues on which it granted certiorari. He first urges that the issue of the validity of California's no-merit appeals procedure is not properly before the Court because state counsel should have filed a merits brief. Robbins identifies nine arguable issues and invites the court to consider them as though he were filing an *Anders* brief in this Court. *Anders v. California*, 386 U.S. 738 (1967). In the Warden's view, this Court should not inquire into the validity of these alleged issues unless and until the Court concludes that the no-merit procedure actually employed in California was impermissible. Even then, inquiry into the merits issues should be conducted in accordance with a *Strickland* standard of prejudice and not simply as if this Court were sitting as a super-California Supreme Court and rehearing the state appeal. If the state has followed a valid procedure, a prisoner cannot ask the federal courts to decide whether his state-law issues were arguable.

In a second attempt to avoid coming to terms with the real issue, Robbins argues that the brief in his case did not comply with California law. *People v. Wende*, 25 Cal. 3d 436 (1979). The *Wende* procedure remains California's legitimate interpretation of *Anders*.

The premise for Robbins's argument is that a competent lawyer can always find *something* to argue and that the failure to find that *something* is the mark, in the colorful argot of the Los Angeles County Jail, of a "dumptruck." In fact, a competent lawyer is an ethical lawyer, one who understands his duties to his client and the court. A competent lawyer knows that the record limits what he can and should argue. A competent lawyer will never argue frivolous, meretricious or baseless claims. Robbins's state appellate counsel grasped these limits, as Robbins himself does not.

## ARGUMENT

### I. STATE APPELLATE COUNSEL'S *WENDE* BRIEF COMPLIED WITH ROBBINS'S 6TH AND 14TH AMENDMENT RIGHTS

#### A. California's *Wende* procedure safeguards indigent no-merit appellants' due process, equal protection and counsel rights.

Robbins's state attorney properly filed a brief pursuant to *People v. Wende*, 25 Cal. 3d 436, 158 Cal. Rptr. 839 (Cal. 1979). J.A. 26-37. The question before this Court is whether California's *Wende* procedure satisfies the Sixth and Fourteenth Amendments. It does.

Robbins seeks rigid, unyielding adherence to the language in *Anders*, shrugging off the notion of *Anders* as a "prophylactic framework[.]" *Pennsylvania v. Finley*, 481 U.S. 551, 555-56 (1987); R.B. 24-30. He fails to take into account the changes in the legal system in the 30 years since *Anders*. When *Anders* was decided in 1967, California had no institutional checks on appointed counsel who filed no-merit briefs. C.A.A.C. 2. The no-merit procedure in *Anders* itself consisted of a conclusory statement ("I will not file a brief on appeal as I am of the opinion that there is no merit to the appeal"), which did not demonstrate to the reviewing court that appellate counsel had read the record and concluded that there were no nonfrivolous issues. *Anders*, 386 U.S. at 742-43.

In 1979, the California Supreme Court decided *Wende*, which expanded the rights of indigent appellants. In 1985, California established the appellate projects, which devote substantial resources to the training, management and review of appointed counsel. C.A.A.C. 8. Today, indigent appellants, protected by *Wende* and the appellate projects, receive top-flight representation. See C.A.A.C. 8-13. A no-merit brief can only be filed only

with the supervising project attorney's consent. *Id.* at 11-12. California thus provides an indigent with a potential no-merit appeal with two independent advocacy reviews and a third independent review by the court. C.A.A.C. 13.

Robbins seems to suggest that, merits aside, retained lawyers who have a monetary incentive will always find an issue to raise, while appointed counsel, whose pay does not hinge on filing a merits brief, will sell their clients down the river. R.B. 28 n.17. This argument unjustifiably slurs both retained and appointed counsel. In *Anders*, Justice Stewart, writing in dissent, noted that the Court's "quixotic requirement" stemmed from "the cynical assumption" that appointed counsel's representation cannot be trusted. Justice Stewart refused to believe that such lawyers were so "lacking in diligence, competence, or professional honesty." *Id.* at 746-47. It is no less an affront for Robbins to imply that retained counsel can be counted on to fabricate issues for money. More to the point, Robbins has shown neither proposition to be true.

The primary issue before this Court is whether California's *Wende* procedure for indigent appellate representation passes constitutional muster. If it does, the question of whether *Anders* is somehow preferable to *Wende* simply does not arise. R.B. 26-30. California has addressed pertinent constitutional concerns about fairness and institutional quality control by establishing the appellate projects, which carefully match lawyers to cases and provide two separate reviews before a third independent review by the appellate court in no-merit cases. This procedure fully satisfies due process and equal protection. Indeed, indigent appellants with no-merit briefs receive substantially more representation and review than do appellants with potentially meritorious claims.

**B. Wende is not contrary to Anders.**

Robbins is wrong when he suggests that *Wende* is contrary to *Anders*. R.B. 35. *Wende* is California's state-authorized approach to achieving the Sixth and Fourteenth Amendment goals articulated by the *Anders* Court. Although it does not slavishly adhere to the suggested *Anders* procedure, *Wende* is a variation on the *Anders* theme that is congruent with its goals. *In re Sade C.*, 13 Cal. 4th 952, 981, 55 Cal. Rptr. 2d 771 (Cal. 1996). It is therefore not contrary to *Anders*. *Anders* is not, after all, "an independent constitutional command that all lawyers in all proceedings, must follow these particular procedures" but rather "establishe[s] a prophylactic framework" for the right to counsel. *Pennsylvania v. Finley*, 481 U.S. at 554-55. This Court has recognized that states may satisfy the Sixth Amendment concerns that underlie *Anders* in a variety of ways. *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 435-36 (1988). Robbins never addresses this essential point.

*Anders* requires "a brief referring to anything in the record that might arguably support an appeal." *Anders*, 386 U.S. at 744. California has determined that appellate counsel can satisfy that requirement by providing the court with statements of the case and facts with citations to the trial record.<sup>1</sup> J.A. 27-34. Counsel's procedural and factual summaries inform the court that counsel has read the record and assist the court in its independent review, without requiring the lawyer to argue against his client by listing rejected claims. Under *Wende*, counsel need not seek to withdraw, because he has not informed the court of his failure to find nonfrivolous issues. *Id.* at 442.

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1. However, counsel must first justify the filing of a no-merit brief to the supervising appellate project attorney. C.A.A.C. 11-15.

Robbins contends that the California Supreme Court has actually disapproved of *Wende*, and that there is no longer a *Wende* process for this Court to assess. R.B. 30-35. This assertion is based on a misreading of *In re Sade C.*, 13 Cal. 4th 952, 980 n.8. (Cal. 1996). Robbins argues that in *Sade C.* the California Supreme Court effected a retrenchment from *Wende*. R.B. 30-34. He goes so far as to state that California does not permit counsel to file a no-merit brief that "fails to identify any legal issues." R.B. 30, citing *Sade C.* at 980 n.8. Accordingly, Robbins insists, *Wende* has been limited, if not overturned *sub silentio*. R.B. 33-34. *Sade C.* did no such thing. In fact, *Sade C.* does not bury *Wende*, it praises *Wende*.

In the first place, the state high court made it clear that the issue in *Sade C.* had nothing to do with evaluating *Wende*'s compliance with the requirements of *Anders*.

An issue arose at the time *Wende* was decided . . . as to whether *Wende* is at variance with *Anders*. . . . The issue of *Wende*'s conformity with *Anders* in this regard is not presented in this cause. We leave its resolution to another day.

*Sade C.*, 13 Cal. 4th at 981. Nonetheless, in dicta, the *Sade C.* court noted with approval that *Wende* improves on the *Anders* formula. The court observed that *Wende* required an independent court review "whenever counsel submits a brief which raises no specific issues . . . ." *Sade C.*, 13 Cal. 4th at 980. Implicit in the phrase "raises no specific issues" is the court's understanding that counsel are *not* required to list issues they have rejected. *Sade C.* is thus an endorsement of *Wende*, not a criticism.

Robbins also argues that California's true procedure is actually "identical" to that set forth in *Douglas v. California*, 372 U.S. 353 (1963), and *Anders*. R.B. 32-34. Curiously, Robbins overlooks the fact that the Ninth Circuit and two of his own amici sharply dispute his interpretation.



In *Davis v. Kramer*, 167 F.3d 494 (9th Cir. 1998), the Ninth Circuit described the no-merit brief filed on behalf of Davis as "indistinguishable" from the brief filed in *Robbins* and held that although "the no-merit brief complied with *Wende*, the requirements of *Anders* 'were not met.'" *Davis* at 497-98, citing *Robbins v. Smith*, 152 F.3d 1062, 1067 (9th Cir. 1998). In *Delgado v. Lewis*, \_\_\_ F.3d \_\_\_, 1999 U.S. App. LEXIS 13759 (9th Cir. 1999), the court reiterated the *Robbins* holding yet again, finding that "*Wende* procedures do not comport with the 'very low threshold' established by . . . *Anders*." *Delgado* at \*15. See also J.A.C. 3-8; N.A.C. 7; but see A.G.A.C. 13; C.J.A.C. 26-27; C.A.A.C. 2-3.

Contrary to Robbins's claims, *Wende* differs from *Anders* and improves upon it. The significant point is that the Sixth Amendment guarantees counsel to indigents, mostly as a matter of equal protection, perhaps partly as a matter of due process. *Anders*, 386 U.S. at 741. California provides indigents with a thoughtfully-assigned lawyer, expert supervision, two advocates' reviews and the *Wende* guarantee of an independent review by the court of appeal. Robbins asserts that counsel is reduced to being "merely a formal presence[.]" R.B. 38, but California courts have held that counsel's remaining on the case benefits both the client and the court. *Sade C.*, 13 Cal. 4th at 981, citing *Wende*, 25 Cal. 3d at 442. California's indigent no-merit procedure meets constitutional demands.

## II. COUNSEL'S PERFORMANCE SHOULD BE EVALUATED UNDER *STRICKLAND*

### A. Robbins forfeited his claim that the Warden waived the prejudice arguments.

The Warden initially asserted in his district court return, Ret. 52-53, that prejudice should be tested under *Strickland v. Washington*, 466 U.S. 668 (1984). After the

district court had rejected that argument and asked the Warden's counsel about the consequences of state counsel's failing to raise an arguable issue, counsel replied that it would "a serious problem," since under *Penson*, prejudice would be presumed.<sup>2</sup> J.A. 47. The Warden did not assert the *Strickland* point in the Ninth Circuit.

Robbins contends that the Warden waived the *Strickland* prejudice argument by not asserting it in the Ninth Circuit. R.B. 39-40. However, Robbins forfeited his objection on this basis by failing to raise it in his opposition to certiorari. R.O.C. 20-22. Under Rule 15.2 of the Rules of the Supreme Court, Robbins should have pressed his objection in his opposition to certiorari to permit the Court to decline the case if it deemed the point precluded. *Jones v. United States*, 1999 U.S. LEXIS 4201, \*40 n.12 (1999), citing *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996), and *Ohio v. Robinette*, 519 U.S. 33, 38 (1996). Without opposition on this point, the Court accepted the case for certiorari on all three questions presented by the Warden. Robbins's failure to raise the issue in his opposition is a default this Court should not forgive. *Jones* at \*40.

Assuming the Court does not bar Robbins from arguing that the Warden waived the *Strickland* point, it has discretion to address the standard for prejudice despite the Warden's failure to raise it in the Ninth Circuit. *Id.* First, the standard for prejudice is "fairly included" within this Court's consideration of the validity of *Wende*. See *Jones* at \*40 n.12. In addition, the *Strickland* prejudice prong is not a separate harmless-error inquiry, but part of the prima facie showing of ineffective assistance. *Lockhart v. Fretwell*, 506 U.S. 364, 369 n.2. (1993). Second, the Warden presented the issue in his return, and the district court rejected it. Third, the issue

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2. *Penson v. Ohio*, 488 U.S. 551 (1988).

has been fully briefed in this Court. W.O.B. 30-42; R.B. 39-44; *Jones* at \*40. It would not be unfair to the Ninth Circuit, or to Robbins, to reach the *Strickland* point, because that court has since expressly applied a presumed prejudice standard in this context in two cases where the state formally asserted that prejudice should be assessed under *Strickland*. *Delgado v. Lewis*, 1999 U.S. App. LEXIS 13759 at \*15-16; *Davis v. Kramer*, 167 F.3d at 499 n.5.<sup>3</sup> Finally, *Anders* antedated *Strickland* by 17 years and does not address the matter of prejudice. Comity, federalism and judicial efficiency would best be served by the Court's determining whether it is necessary to reverse a state conviction even if the defendant suffered no harm from counsel's failure to assert an issue on appeal. *Granberry v. Greer*, 481 U.S. 129, 134 (1987); *Boyd v. Thompson*, 147 F.3d 1124, 1127 (9th Cir. 1998).

**B. Strickland is the appropriate test for prejudice.**

As the Warden urged in his opening brief, this Court should recognize a *Strickland* test for prejudice in cases where appointed counsel have failed to raise nonfrivolous issues on appeal. Under *Strickland*, the federal court would not need to determine that the assertedly arguable issues were frivolous, only that their omission did not undermine confidence in the outcome. A prejudice analysis fosters comity by honoring the states' criminal judgments, except where counsel's deficient performance rendered the proceeding unfair or the result unreliable. *Lockhart*, 506 U.S. at 369-70; *Strickland*, 466

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3. It can even be stated with assurance that the *Robbins* panel itself would have rejected a *Strickland* analysis in favor of a presumption of prejudice. Chief Judge Hug wrote *Robbins*, with Judges Reinhardt and Pregerson concurring. Judge Reinhardt was the author of the 3-0 decision in *Davis*, and Judge Pregerson was a member of the 3-0 panel in *Delgado*.

U.S. at 687. Robbins's suggestion that a rule of presumed prejudice would somehow further comity, R.B. 40, is palpably absurd.<sup>4</sup> A prejudice analysis dooms all nine of the issues Robbins has characterized as arguable.<sup>5</sup>

*Strickland* should also be adopted in fairness to appellants whose counsel file merits briefs. If state counsel files a one-issue brief, his client receives neither an independent review nor the windfall of an automatic new appeal when counsel fails to raise additional arguable issues. Quite the contrary: this Court has praised counsel who "winnow[] out weaker arguments." *Jones v. Barnes*, 463 U.S. 745, 751 (1983). In fact, to make a prima facie case of ineffective assistance of counsel, a defendant must normally show both subpar performance and prejudice. *Lockhart*, 506 U.S. at 369 n.2. Only after the prima facie case has been made is the case tested for prejudice. *Id.* As a matter of equal protection, no-merit indigents should not receive a windfall unavailable to all other appellants.

By way of analogy, most constitutional errors are subject to harmless-error analysis. *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991). The requirement that a petitioner show harm should be applied to the evaluation of counsel's performance in the filing of an indigent no-merit brief on appeal, because such errors do not "defy analysis by 'harmless error' standards" or "transcend[] the criminal process." *Id.* at 309, 311. This is particularly true of evaluating appellate performance, because the trial is the "main event," and the Constitution does not require a state to provide an appellate process for criminal defendants at all. *Goeke v. Branch*, 514 U.S. 115, 120 (1995); *Granberry*, 481 U.S. at 132. The sole purpose of

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4. Robbins also argues that the *Anders* procedure is more efficient for federal-court review. R.O.B. 43-44. Whatever the merits of that observation, it is irrelevant to *Wende's* constitutionality.

5. The same analysis shows them to be frivolous.



the appellate process is to correct errors which rendered the trial unfair. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985).

A rule of presumed prejudice would have been unnecessary even in *Penson v. Ohio*, 488 U.S. 75. If *Strickland* had been applied there, Penson would still have won a new appeal, because his attorney's failure to raise reversible constitutional error in the instructions defining the elements of the crime rendered the proceedings unreliable. *Lockhart*, 506 U.S. at 369-70.

Finally, Robbins suggests that his counsel abandoned him and that he was thereby denied counsel. R.B. 44. He is incorrect. Despite the mess Robbins had made of the trial record, state appellate counsel consulted with the appellate project, filed a brief to assist the court, obtained an independent review, and remained available to argue any issues the court might identify. Robbins does not suggest how his situation would have been improved by counsel's listing the frivolous issues he had rejected.

### C. There were no nonfrivolous issues.

Robbins has argued that this Court need not address *Anders*, because counsel should have filed a merits brief asserting nonfrivolous issues. R.B. 12. As the Warden's record-based discussion of the issues will demonstrate, and state appellate counsel demonstrably understood, Robbins had no entitlement to a merits brief. The issues Robbins has presented in federal court are baseless.

In warning Robbins of the dangers of self-representation, the state trial court told him:

You understand that you are probably going to make mistakes that might prejudice you, you are going to leave things out of the record that should be there, on appeal you are going to find deficiencies in the record that wouldn't be there if you were being represented.

J.A. 219. Truer words were never spoken.

Scrambling to avert the devastating consequences of his decision to represent himself at trial, Robbins asserted in the district court that his appointed appellate counsel failed to raise numerous arguable issues on direct appeal. After multiple rounds of briefing, the court relied on only two issues: the adequacy of the law library and Robbins's right to counsel. J.A. 49-53. The Ninth Circuit followed suit. J.A. 89. Robbins advances those two issues and adds seven others. R.B. 14-23. Although Robbins now suggests that these issues preclude this Court's reaching the merits of the *Anders* question, he has forfeited this argument by failing to raise it in his opposition to certiorari. Rule 15.2, Rules of the Supreme Court of the United States. His argument also fails on the merits. State counsel properly declined to assert these wholly frivolous issues. If *Strickland* had been applied, Robbins's state-court judgment would have been upheld, because there was no prejudice from failing to argue issues which were frivolous on the record Robbins had made.

Counsel is obligated to file a merits brief on direct appeal only if the record presents arguable issues. *Anders* 386 U.S. at 744. An arguable issue is a meritorious issue. *People v. Johnson*, 123 Cal. App. 3d 106, 109, 176 Cal. Rptr. 390 (Cal. 1981).<sup>6</sup> Under state law, matters outside the trial record cannot be considered on direct appeal. Cal. R. Ct. 4, 5; *In re Kathy P.*, 25 Cal. 3d 91, 102, 157 Cal. Rptr. 874 (Cal. 1979).

In unspoken acknowledgement of the weakness of his merits arguments, Robbins urges this Court to "presume that arguable issues exist[,]" because the Warden stated that the Ninth Circuit's finding of two arguable issues was not relevant to the questions presented. R.B. 17, citing

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6. The words "meritless," "frivolous," "wholly meritless" and "without merit," are used interchangeably. Junkin, *The Right to Counsel in "Frivolous" Criminal Appeals: A Reevaluation of the Guarantees of Anders*, 67 Texas L. Rev. 181, 188 n.54 (1988).



W.R.C. 5 n.3. He has wrenched the comment out of context. The Warden has challenged the existence of arguable issues at every stage of this litigation. W.R.C. 5 n.3. There is no waiver and no basis for a presumption. W.R.C. 4-5, 5 n.3, 7. The nonfrivolous issues Robbins now asserts are designed to distract the Court from considering the heart of this case, the validity of California's no-merit brief procedure. W.R.C. 4-5.

Robbins cannot blink away the hard facts of the record. State appellate counsel could not file a merits brief, because, as the trial court had warned and Robbins impliedly admits, Robbins failed to preserve any issues at trial. R.B. 2. As demonstrated below, the nine issues he now raises are meritless.

**1. Refusal to provide funds for a forensic expert and investigator. R.B. 18.**

Robbins was allocated \$500 for an investigator, because that was all he asked for. J.A. 251-253, 263. The guidelines for investigative funding apply to represented and pro per defendants alike. J.A. 240-41. The trial judge told Robbins that if the investigator would not accept the \$500 that had been allotted, Robbins would have to prepare a court order authorizing the expenditure of an additional \$500. J.A. 263-64. The judge said he would authorize up to \$5,000 if Robbins followed the rules and filed the appropriate orders. J.A. 241-42, 251-53. Robbins never did so.

Robbins also cites as an issue the court's failure to give him funding for a forensic expert. R.B. 18. Again, the record belies his claim. He moved a week before trial for yet another continuance and, among other things, a forensic expert. J.A. 268-82. In his written offer of proof, Robbins said the forensic expert would disprove the People's case and remove all doubt as to his innocence. He did not say how. J.A. 270. The allowance of funds for

investigation is predicated upon the indigent's showing of need. Failure to meet that burden defeats an appellate claim of error. *People v. Beardslee*, 53 Cal. 3d 68, 100, 279 Cal. Rptr. 276 (Cal. 1991). Robbins did not make a sufficient showing. An appellate claim would have failed.

In any event, the trial court denied the continuance, but never ruled on the forensic expert, J.A. 283-99, and Robbins never pressed for a ruling. Robbins thus forfeited the issue by failing to obtain a ruling. *People v. Danielson*, 3 Cal. 4th 691, 729, 13 Cal. Rptr. 2d 1 (Cal. 1992). There was nothing to appeal. Even assuming, however, that counsel could have argued *something*, Robbins cannot show that the issue was a likely winner that touched on the fairness of his trial. He certainly cannot show that he was deprived of a federal constitutional right.

**2. Alleged failure to provide an adequate law library. R.B. 19.**

The issue of the adequacy of the law library was fully discussed in the Warden's opening brief. W.O.B. 36-38. The record shows that Robbins never complained at trial about the law library or documented its alleged deficiencies. The trial court's warnings to Robbins about the obstacles he would face as a pro per defendant, including a bleak description of the library, were not evidence that would have warranted raising the issue on direct appeal, particularly in light of Robbins's assertion a week before trial that "[he was] doing okay as far as the law work and stuff[,]" but needed someone to help him with the public speaking. J.A. 255-57, 320.<sup>7</sup> Robbins's personal testimonial to the library's adequacy was buttressed by the research evidenced in his pro per

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7. *Faretta v. California*, 422 U.S. 806 (1975).

pleadings. In his motion for a continuance, for example, Robbins cited ten cases and the Constitution. J.A. 268-71.

In his merits brief, Robbins improperly includes an appendix containing two pleadings ostensibly filed in the trial court. R.B. 7-9, citing his own App. A.<sup>8</sup> To this day, Robbins has never presented the law library claim to the state supreme court in any guise. *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995). Even worse, he now attempts to fundamentally alter his claim by bringing in new evidence in his appendix. *Vasquez v. Hillery*, 474 U.S. 254, 260, 106 S. Ct. 617 (1986). The claim and the documents should be excluded. They are unexhausted.

Even if the Court considers the extra-record evidence, the issue is meritless. In the written motion, Robbins stated, "The law library was found to be inadequate back in 1975 and hasn't been updated since." App. A 7. He made no showing of current deficiency or actual prejudice, nor could he have done so in view of his numerous and lengthy filings in the trial court. See J.A. 268-82. Thus, even had his conclusory allegations shown the law library to be theoretically subpar, Robbins did not "demonstrate that the shortcomings in the library . . . hindered his efforts to pursue a legal claim." *Lewis v. Casey*, 518 U.S. 343, 351 (1996). The library issue lacked any basis in the appellate record.

**3. Refusal to provide advisory counsel. R.B. 19-20.**

The state court's refusal of advisory counsel has been thoroughly addressed in the Warden's opening brief. W.O.B. 39-41. The appointment of advisory counsel is a matter of trial court discretion under state law. *People v.*

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8. The Warden has moved to strike appendix A on grounds that it contains matters which are unexhausted, outside the record, tardy and forfeited under this Court's rules.

*Clark*, 3 Cal. 4th 41, 97, 10 Cal. Rptr. 2d 554 (Cal. 1992). Citing *People v. Bigelow*, 37 Cal. 3d 731, 742-46, 209 Cal. Rptr. 328 (Cal. 1984), Robbins disingenuously suggests the denial of advisory counsel "may be an abuse of discretion, which is reversible per se." R.B. 19. In *Bigelow*, the state court found prejudicial error where a judge in a capital trial believed he lacked discretion to appoint advisory counsel. *Id.* at 743. The instant record shows the judges who ruled on Robbins's repetitive motions for advisory counsel fully understood and properly exercised their discretion. J.A. 248-49, 266-67, 324. There was no arguable issue here.

**4. Refusal to permit Robbins to withdraw his Faretta waiver. R.B. 20.**

The Warden countered this claim in his opening brief, W.O.B. 41-42, and in his reply to the opposition to his petition for certiorari, W.R.C. 5-6. When his claim is tethered to the reality of the trial record, Robbins's unwillingness to withdraw his *Faretta* waiver is conclusively established by his refusal to accept the reinstatement of the public defender as his counsel. J.A. 323-24. He tacitly admits his refusal, but now contends that the court had an obligation to explore the basis for a newly-asserted conflict. R.B. 20. The claim is spurious.

A week before trial, Robbins asked for the assistance of counsel to help him with the public speaking at trial. J.A. 320. The court denied him advisory counsel but offered to reappoint the public defender, unless there was a conflict. J.A. 322-23. Robbins responded that his family had filed a lawsuit against the public defender's office and the county. J.A. 323. He did not name individual deputies. *Id.* He provided no evidence of the suit then, nor has he come forth with any in all the years since that time. The court, finding that Robbins was engaging in further dilatory tactics, denied the motion. J.A. 323-24.



On these facts, the denial was proper. *People v. Hardy*, 2 Cal. 4th 86, 133-38, 5 Cal. Rptr. 2d 796 (Cal. 1992). Appellate counsel properly refused to fabricate a counsel issue without record support.

**5. Refusal to order discovery of the decedent's arrest record. R.B. 21.**

Robbins was not entitled to his victim's arrest record, because it was irrelevant to his defense of denial. Under California law, a discovery motion is addressed to the sound discretion of the trial judge. *Hill v. Superior Court*, 10 Cal. 3d 812, 816-17, 822, 112 Cal. Rptr. 257 (Cal. 1974). The victim's history of violence would have been admissible only if Robbins had claimed self-defense. However, he denied culpability from his earliest appearances through counsel in municipal court ("[T]he defense . . . is that he didn't do it,") to his last words of pro per jury argument ("I am not contesting the fact that a very serious crime occurred, just that I did not do it"). C.T. 9-10; R.T. 310. In the face of Robbins's unwavering defense of denial, the victim's aggressiveness was not relevant to any issue in the case. There was nothing to argue on appeal.

**6. Alleged failure to serve Robbins's trial subpoenas. R.B. 21-22.**

Robbins complains that the court never subpoenaed the second investigator, Deputy Jones, or the fingerprint officer, Deputy Rottler. There is no basis for this issue.

Although a defendant has the right to subpoena witnesses, the trial court retains the inherent power to control the issuance of subpoenas. *People v. Smith*, 38 Cal. 3d 945, 958-59, 216 Cal. Rptr. 98 (Cal. 1985); *People v. Fernandez*, 222 Cal. App. 2d 760, 768-69, 35 Cal. Rptr. 370 (Cal. 1963). The court could not serve Deputy Jones,

because he had retired, and the court had no address for him. J.A. 294-95. In addition, his testimony would have been cumulative to that of his partner, who did testify. The judge believed that the prosecutor had subpoenaed Deputy Rottler, the officer who dusted the scene for fingerprints. J.A. 296-97. However, the prosecution offered no fingerprint evidence at trial, and Deputy Rottler did not appear. Robbins could not have made the required showing of prejudice on appeal, *see* Art. VI, §13, Cal. Const., because the best testimony Rottler could have given for Robbins was that his fingerprints were not found at the scene. In Rottler's absence, there was no evidence that Robbins's fingerprints were found at the scene. Competent appellate counsel would not raise such a claim.

**7. The reasonable doubt instruction. R.B. 22.**

Robbins contends that the validity of the reasonable doubt instruction was an open question when his case was appealed, and appellate counsel should have asserted the issue, even though the instruction was later approved by this Court in *Victor v. Nebraska*, 511 U.S. 1, 10-17 (1994). Before certiorari was granted in *Victor*, California appellate courts would have affirmed the instruction on stare decisis grounds. *People v. Sandoval*, 4 Cal. 4th 155, 185-86, 14 Cal. Rptr. 2d 342 (Cal. 1992). While *Victor* was pending, the state courts held onto reasonable-doubt-instruction cases and ultimately affirmed them when *Victor* had been decided. Robbins cannot show that counsel's deficient performance rendered the proceeding unfair or the result unreliable. *Lockhart v. Fretwell*, 506 U.S. at 369-70. This is the paradigm of a frivolous issue.



**8. Alleged failure to hear Robbins's motion to dismiss. R.B. 22-23.**

Once again turning his back on the facts, Robbins asserts that the trial court never allowed him to argue his "*Hitch/Trombetta*" motion to dismiss for failure to preserve evidence. R.B. 5, 22. He further represents that "[t]he court evidently (but mistakenly) believed that another judge had decided the motion. J.A. 285-86." R.B. 5 n.3. Once again, the record belies his claim:

The Defendant: I believe *there is a couple other motions there I would like to have reheard*; a motion for advisory counsel and also a motion for -- *Hitch/Trombetta* motion.

The Court: As far as I know, those motions have been heard.

The Defendant: *Yes. I would like to have them reheard, Your Honor.*

The Court: You don't do that. Once a motion is heard, then you don't transfer to another court and ask to start all over again. ¶ . . . You can't retry and relitigate the same things in the trial court over and over again.

The Defendant: All right.  
J.A. 285-86 (emphasis added). In the face of Robbins's admission that he sought rehearing, it would have been preposterous for appellate counsel to raise this issue on direct appeal.

**9. Alleged improper ex parte contract. R.B. 23.**

Adverting to the service of Robbins's subpoenas, the judge said, "I was inquiring of the prosecutor as to the officers -- there is duplication." J.A. 297. On the sand of that insubstantial comment, Robbins builds a fantasy claim: an ex parte contact. Initially, there is every reason to assume that the judge made the inquiry in open court,

in the presence of Robbins, in an unreported exchange; and Robbins did not meet his burden of showing otherwise. Even if an ex parte exchange actually occurred, Robbins has never suggested how the appellate record showed that he was prejudiced by the alleged contact. Appellate counsel properly found the issue was not arguable.

In sum, the appellate process exists to correct errors which rendered the trial unfair. *Evitts v. Lucey*, 469 U.S. at 396. Although Robbins's pro per election was a poor choice, he received a fair trial and a fair appeal. None of the issues he has raised in federal court undermines confidence in the fairness of those proceedings. Put another way, Robbins cannot possibly show he was prejudiced within the meaning of *Strickland* because these nine claims were not asserted on appeal. The lower federal courts have improperly relieved him of many of the inevitable consequences of his *Faretta* waiver, to the state's detriment. This Court should rectify that error.

**III. THE NINTH CIRCUIT VIOLATED *TEAGUE v. LANE***

Robbins contends this Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989), is inapplicable, because *Anders* and *Douglas* antedated *Feggans* and *Wende*. R.B. 45-49. The Warden disagrees.

It is not enough for Robbins to cite to a pre-existing case. In order to avoid *Teague*'s new-rule proscription, that case must *dictate* or *compel* the result he now seeks. *O'Dell v. Netherland*, 521 U.S. 151, 160-64 (1997); *Lambrix v. Singletary*, 520 U.S. 518, 530-31 (1997); *Saffle v. Parks*, 494 U.S. 484, 489 (1990). Because *Anders* did not dictate the result he seeks, the California Supreme Court's longstanding interpretation of *Anders*'s requirements is entitled to *Teague* deference on federal habeas corpus.

Robbins's claim that *Wende* violates state law, R.B. 46, is not cognizable on federal habeas corpus, *Estelle v. McGuire*, 502 U.S. 62, 68 (1991); *Pulley v. Harris*, 465 U.S.

37, 41 (1989), and is immaterial to the *Teague* question. See *Sawyer v. Smith*, 497 U.S. 227, 239-41 (1990).

### CONCLUSION

For the stated reasons, the Warden respectfully urges this Court to uphold California's *Wende* procedure and institute a *Strickland* test for prejudice or, in the alternative, to find that the lower courts applied a new rule in violation of *Teague v. Lane*.

Dated: July 20, 1999.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

CLERK

OCTOBER TERM, 1998

GEORGE SMITH, Warden,

*Petitioner,*

v.

LEE ROBBINS,

*Respondent.*

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION TO MOTION  
TO STRIKE EXTRA-RECORD MATERIALS

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PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION TO MOTION  
TO STRIKE EXTRA-RECORD MATERIALS

INTRODUCTION

Petitioner GEORGE SMITH, Warden, hereby submits his reply to Robbins's opposition to the motion to strike 1) the extra-record materials Robbins has appended to his merits brief in opposition, and 2) the tape and transcript of the argument in the court of appeals. The contents of the appendix have never been presented to the California Supreme Court and are thus unexhausted. These outside-the-record materials are also irrelevant or cumulative, and they are tardy under this Court's Rules. Rule 26, Rules of the Supreme Court of the United States. The tape of the Ninth Circuit is irrelevant, and the transcript is both irrelevant and inaccurate. In attempting to improvise a record at the last possible moment, Robbins betrays an utter disregard for

settled appellate rules and procedures. His effort should be rebuffed.

ARGUMENT

I.

**THIS COURT SHOULD EXERCISE ITS DISCRETION TO  
DENY ROBBINS'S REQUEST FOR JUDICIAL NOTICE**

Although this Court has the discretion to grant a motion for judicial notice of extra-record facts, it should not do so unless the facts are "not subject to reasonable dispute" because they are either generally known or capable of ready and accurate determination. See Fed. R. Evid. 201(b). "Only in extraordinary situations should the record on appeal be supplemented with material that was not before the district court." *Barilla v. Ervin*, 886 F.2d 1514, 1521 n.7 (9th Cir. 1989); *Ross v. Kemp*, 785 F.2d 1467, 1474 (11th Cir. 1986).

The power to judicially notice facts outside the record is to be exercised by courts with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt upon the subject should be resolved promptly in the negative.

*Brown v. Piper*, 91 U.S. 37, 43 (1875); see also *Osborne v. Gray*, 241 U.S. 16, 21 (1916) (Court declares itself "unable" to remedy a deficiency in the evidence by taking judicial notice of unproven facts).

Robbins has not presented an "extraordinary situation" to the Court to justify his request for judicial notice. On the



contrary, his rather mundane explanation is that he did not get around to examining the state-court files until after he read the Warden's merits brief in this Court. Opp. 14. Counsel's failure to consult and present these materials years ago does not constitute an "extraordinary situation" warranting judicial notice. Robbins's request should be denied.

Robbins contends that "it speaks volumes that the Warden's motion to strike does not even address the question whether judicial notice of the documents and the tape is appropriate." Opp. 2. The Warden did not address judicial notice in his motion, because he relied on Robbins's written representation to Chief Deputy Clerk Francis Lorson that he was withdrawing his request for judicial notice and asking Mr. Lorson instead to "simply lodge [the documents] with the Court." Opp. Ex. B. That representation seems to have fallen by the wayside. There should be no misunderstanding: the Warden objects to this Court's considering any materials which are outside the record, regardless of the means by which Robbins attempts to import them into the case -- a request for judicial notice, a request for lodging, or an appendix to his brief.

## II.

### ROBBINS HAS NOT FAIRLY PRESENTED THE STATE SUPREME COURT WITH THE DOCUMENTS HE SEEKS TO INTRODUCE IN THIS COURT

To exhaust state remedies, a petitioner must recite both the factual and federal constitutional bases for his claims in

the state supreme court, in order to give the state the opportunity to correct alleged constitutional violations. *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995).

Searching for a loophole in the exhaustion requirement, Robbins advances the notion that these materials need not be exhausted for this Court to take judicial notice of them. Opp. 7. He attempts to justify his delinquency in providing the documents by blaming the Warden for a merits brief which contained the strident argument that, aside from the colloquy between Robbins and the trial judge, Robbins had never specifically objected to the state of the jail law library.

*Id.* Robbins distorts the facts in two significant respects. First, he cannot colorably imply that this argument was first presented in the Warden's merits brief in this Court. In the Ninth Circuit, the Warden raised failure to exhaust in his opening brief, his reply brief, and his petition for rehearing. WOB9 38-39; WRB9 26-27; PR 9-12.<sup>1/2</sup> Second, the

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1. "WOB9" refers to the Warden's Opening Brief in the Ninth Circuit. "WRB9" refers to the Warden's Reply Brief in that court. "PR" refers to the Warden's Petition For Rehearing in the Ninth Circuit.



Warden argued in the Ninth Circuit, without contradiction from Robbins, that the trial judge's warnings about the dangers of pro per representation were not evidence and that Robbins failed to object to the law library in any state court. WOB9 40-41; WRB9 28; PR 11-12. In other words, the Warden has consistently maintained that Robbins never interposed a state-court objection to the law library and never adduced any evidence in support of this claim at any time, in any state court. Similarly, Robbins never asserted in any state court that his appellate counsel was ineffective for failing to

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2. In the district court, the Warden properly conceded exhaustion in his initial return to Robbins's pro se petition. In a supplemental petition filed nearly a year later by counsel, Robbins laid out a laundry list of claims he said state counsel should have raised on appeal. USDC Supp. Pet. 24-34. The law library was mentioned, not as an independent claim, but as an example in support of Robbins's complaint that he had not

been given a sufficient opportunity to prepare his defense once he was forced to proceed pro per. As stated above, Robbins was given only \$500 to investigate this matter, even though he was standing trial for first degree murder. (CT, 149.) He was also relegated to a county jail law library which the trial judge knew had been improperly maintained, since the pages of all the helpful cases had been torn out of the books. (AT, 19:13 - 20:11.)

USDC Supp. Pet. 28-29. The pages of the augmented transcript to which Robbins cited did not contain any evidence of the library's deficiency, only the judge's warnings about the dangers of waiving counsel, including a warning about the difficulties Robbins might encounter in using the library. See J.A. 255-57. Nonetheless, the district court seized on the law library example and transformed it into an "arguable issue." J.A. 49-50. In the Ninth Circuit, the Warden complained repeatedly that the issue had never been presented to the California Supreme Court and was therefore unexhausted, to no avail.

raise the deficiencies in the law library. The claim itself is unexhausted.

Evidence that arguably improves the evidentiary basis for a federal claim renders the claim unexhausted if it has never been presented to the state courts. *Aiken v. Spaulding*, 841 F.2d 881, 883 (9th Cir. 1988); see also *Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir. 1988). This tardily-presented evidence submitted to bolster an unexhausted claim is therefore also unexhausted. Robbins should be foreclosed from presenting the evidence here.

Robbins cites *Vasquez v. Hillery*, 474 U.S. 254, 260, 106 S. Ct. 617 (1986), for the proposition that, even though he never presented the four appendix documents to the California Supreme Court, they are properly considered because they do not fundamentally alter the legal claims. Opp. 9. *Hillery* is inapposite. *Hillery* had presented his federal challenge at every level in the state courts. *Hillery*, 474 U.S. at 256. This Court limited itself to ruling on additional facts presented to the district court at the district court's request and found that the exhaustion doctrine was not violated "when the prisoner [had] presented the substance of his claim to the state courts." *Id.* at 257-58 (emphasis added). The Court stated, "We have never held that presentation of additional facts to the district court, pursuant to that court's directions, evades the exhaustion requirement. . . ." *Id.* at 257-258. As distinguished from the instant case, all of the operative facts in *Hillery* had

been presented to the state court, the new evidence in support of those facts thus did not fundamentally alter the claim so as to implicate the doctrine of exhaustion, and the district court had requested the additional information. Hillery is inapposite.

### III.

#### THE DOCUMENTS ARE IRRELEVANT OR CUMULATIVE TO ANY DISPUTED ISSUE PROPERLY BEFORE THE COURT

The documents Robbins presents in his appendix are either irrelevant or cumulative to any disputed issue properly before this Court.

#### A. The felony complaint for extradition. App. 1-4.<sup>3</sup>

There is no controversy about the fact that a complaint was issued, that Robbins was arrested outside the state, and that he was returned to California. Robbins suggests that the complaint should have been included in the appellate record and presented to the state reviewing court, but he never explains how it could possibly have mattered. Opp. 5.

In California, a felony complaint is filed in municipal court and pertains only to the preliminary hearing. Cal. Pen. Code §§ 949, 959. Under state law, the denial of rights at the preliminary hearing in municipal court is harmless, unless the defendant can show either that the court did not have jurisdiction or that an error in the procedure deprived him of

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3. "App." refers to the appendix to Robbins's opposition brief on the merits.

a fair trial in superior court. *People v. Pompa-Ortiz*, 27 Cal. 3d 519, 529, 165 Cal. Rptr. 851 (1980); see also *Coleman v. Alabama*, 399 U.S. 1, 8 & 8 n.3 (1970).

Robbins does not suggest that he can meet the stringent requirements of *Pompa-Ortiz*. The complaint does not relate to any of the allegedly arguable issues Robbins has presented in this Court or suggest an argument that state counsel should have presented to the state reviewing court. It is irrelevant to any issue in dispute.

#### B. The motion for appointment of advisory counsel. App. 5-15.

In a motion for advisory counsel, Robbins, almost as an aside, included a single sentence relating to the law library, stating that it had been found inadequate in 1975 and had not been updated since then. App. 7. In that motion, Robbins cited a 1975 California case for the 1975 finding of inadequacy, but cited nothing for the proposition that the library had not been updated. *Id.* More importantly, he did not state that he had been having problems with the library. *Id.* Despite his failure to bring this document to any state or federal court's attention during the many years this matter has been in litigation, Robbins now attempts to use it to bolster his unexhausted claim that the library was constitutionally defective. The document relates to an issue never presented to the California Supreme Court: appellate counsel's failure to raise the inadequacy of the law



library.<sup>4</sup> Because the law library issue itself is not properly before this Court, Robbins's trial-court motion for appointment of advisory counsel, which is intended to supplement the library issue, is irrelevant.

**C. The petition for writ of mandate/prohibition.** App. 16-23.

Robbins faults state counsel for failing to include this petition in the appellate record, suggesting that it might have demonstrated Robbins's "persistent efforts to secure advisory counsel." Opp. 6. Evidence properly included in the joint appendix abundantly makes that point without resort to extra-record materials. Robbins's persistence is simply not at issue. His right to advisory counsel is. He had none. The petition is cumulative.

**D. The California Court of Appeal's appointment of David Goodwin as counsel on appeal.** App. 24-25.

Robbins cites to this order to support his assertion that David Goodwin was appointed to represent him on appeal. Opp. 6, 8. This is not exactly news, and it does not require fresh evidence. Mr. Goodwin's no-merit brief and penalty-of-

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4. Robbins's federal counsel attack state appellate counsel for "inexplicably and improperly fail[ing] to include [this issue] in the record on appeal." Opp. 19. Their criticism is ironic, since they did not raise the issue in the district court. The first time state appellate counsel was faulted for failing to raise the law library's deficiencies was when United States District Judge King raised the issue sua sponte in his opinion. J.A. 49-51.

perjury declarations, as well as the state appellate court's opinion naming him as counsel, are before this Court. J.A. 26-37, 38-39, 43. The formal order appointing him has no significance.

**IV.**

**THE CONTENTS OF THE APPENDIX ARE TARDY UNDER  
RULE 26 OF THE RULES OF THE SUPREME COURT**

Robbins should have proposed the documents he has provided in the appendix to his brief for inclusion in the joint appendix. Robbins's admitted delay in exploring the superior court file is neither justified nor excused by his claim that the Warden's "strident" opening-brief argument prompted him to examine the trial file for the first time. Opp. 14.

Trying mightily to shift the burden, Robbins also suggests that the state-court record was as available to the Warden as it was to him. Opp. 14 n. 4. On federal habeas corpus, the prisoner has the burden of proof to establish his constitutional claims. *Garlotte v. Fordice*, 515 U.S. 39, 46 (1995); *Walker v. Johnston*, 312 U.S. 275, 286 (1941). The Warden had no duty to present extra-record materials to the federal court. Contrary to Robbins's claim, Robbins's efforts have not been "diligent, though unavailing[.]" Opp. 13. He has displayed no diligence at all. His laxity should not be rewarded.



## V.

**THE TAPE OF THE NINTH CIRCUIT ARGUMENT IS  
IRRELEVANT AND THE TRANSCRIPT INACCURATE**

The tape of the Court of Appeals argument which Robbins has provided is unauthenticated and uncertified. In addition, it is frequently inaudible. Because of the audibility problems, it is sometimes difficult to follow and potentially misleading. It is also irrelevant to the issues in this case.

The transcript is, even on a superficial comparison with the tape, inaccurate. Robbins states that he has offered it "as an aid to this Court," Opp. 15, but an inaccurate transcription is of no assistance to the Court. Robbins tacitly admits the inaccuracies when he suggests that he "did his best in transcribing the tape. If the Warden believes that the transcript contains errors, he can file those corrections with this Court . . . ." Opp. 15. Once again, Robbins misapprehends the allocation of responsibilities. The Warden has no duty to correct an unauthenticated, inaccurate, irrelevant, untimely document which is not properly before this Court. Robbins's request to lodge the tape and transcript of the Ninth Circuit argument should be denied.

**CONCLUSION**

For the stated reasons, petitioner respectfully requests that the Court deny Robbins's requests for judicial notice and lodging and strike Appendix A and all references to these belatedly-offered extra-record materials in Robbins's merits brief, as well as the tape and transcript of the Ninth Circuit argument.

Dated: July 20, 1999.

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No. 98-1037

In The  
**Supreme Court of the United States**  
October Term, 1998

GEORGE SMITH, WARDEN,

*Petitioner,*

vs.

LEE ROBBINS,

*Respondent.*

On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Ninth Circuit

BRIEF OF THE AMICI CURIAE STATES OF ARIZONA,  
ET AL. IN SUPPORT OF PETITIONER

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## INTEREST OF AMICI CURIAE

In *Robbins v. Smith*, 152 F.3d 1062 (9th Cir. 1998), amending 125 F.3d 831 (9th Cir. 1997), the Ninth Circuit declared unconstitutional California's procedures governing the filing of no-merit appellate briefs by appointed counsel on behalf of indigent criminal defendants on the stated ground that they do not conform with *Anders v. California*, 386 U.S. 738 (1967). *Robbins* will severely affect the Amici states that have literally thousands of criminal defendants whose appeals mirrored the California procedure. If *Robbins* is allowed to stand, a flood of no-merit appeals will return to the state and federal courts despite the fact that appointed counsel and the state appellate courts have already determined that no arguable appellate issues exist. Other states have joined as Amici herein because *Robbins* severely undermines each state's right to determine its own procedures in compliance with *Anders*. The result dictated by *Robbins* offends the interests of the Amici Curiae in protecting the finality of criminal convictions, assuring equal treatment of all criminal defendants, indigent or affluent, and in preserving public resources.

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## SUMMARY OF ARGUMENT

*Anders* and its progeny protect an indigent criminal defendant's right, under the Fourteenth Amendment's due process and equal protection clauses, to the effective assistance of state-appointed appellate counsel in the first appeal as of right. Those cases do not afford indigent criminal defendants more rights under the Constitution than those defendants represented by retained counsel,



they only guarantee that indigent defendants are treated with substantial equality.

In *Robbins*, the Ninth Circuit held that *Anders* requires appointed counsel to state arguable issues and federal courts to search for them on habeas review. The practical result of this holding is that federal courts will now be compelled, in *Anders* cases, to search the state court record for arguable issues, despite the fact that: (1) neither indigent criminal defendants whose appointed counsel file merit briefs nor criminal defendants whose retained counsel withdraw from representing them on appeal because they find no arguable issues are afforded this benefit; (2) indigent criminal defendants whose counsel file no-merit briefs are already afforded a more thorough review of their appeals than other criminal defendants, indigent or not, who file merit briefs; and (3) the indigent criminal defendants' appointed counsel, who file no-merit briefs, as well as the appellate court and its staff have already meticulously searched the state court record for arguable issues and found none to exist.

The Ninth Circuit's opinion in *Robbins* bestows upon indigent criminal defendants whose attorneys file no-merit briefs, the right to a comprehensive federal court habeas review of the state court record. This holding misconstrues *Anders*, and violates the state's right to finality of criminal convictions, undermines its ability to preserve public resources, and violates the principles of equal protection. It also creates a new rule of criminal procedure in a collateral proceeding in violation of *Teague v. Lane*, 489 U.S. 288 (1989).

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## ARGUMENT

**AS A CONSEQUENCE OF *ROBBINS*, FEDERAL COURTS, ON HABEAS REVIEW, WILL SEARCH STATE COURT RECORDS FOR ARGUABLE ISSUES IN *ANDERS* CASES, THEREBY DILUTING THE EQUAL PROTECTION AND DUE PROCESS GOALS ARTICULATED IN *ANDERS*, AND OFFENDING THE STATES' INTERESTS IN ASSURING THE FINALITY OF CRIMINAL CONVICTIONS AND IN PRESERVING PUBLIC RESOURCES.**

### **A. *Anders* and its Progeny: Equal Protection and Due Process Concerns.**

In *Anders v. California*, 386 U.S. 738 (1967), this Court evaluated appointed counsel's duty to "prosecute a first appeal from a criminal conviction, after that attorney has conscientiously determined that there is no merit to the indigent's appeal." *Id.* at 739. There, appointed counsel followed California's established procedures; he wrote a letter advising the appellate court that he had concluded his client's appeal had no merit, and simultaneously advised the court that the defendant wished to file a brief on his own behalf. *Id.* After reviewing the defendant's brief and the record, the California appellate court affirmed the conviction. *Id.* The defendant then filed a habeas corpus petition in the California Supreme Court, and that court also affirmed his conviction. *Id.* at 740-41.

This Court reversed, finding that California's no-merit letter procedure did not comport with "fair procedure and lack[ed] the equality that is required by the Fourteenth Amendment." *Id.* at 741. This Court reasoned that it had "consistently held invalid those procedures 'where the rich man, who appeals as of right, enjoys the

benefit of counsel's examination into the record, research of the law, and marshaling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself.' " *Id.* (quoting *Douglas v. California*, 372 U.S. 353, 358 (1963)). In *Douglas*, this Court held that absolute equality is not required in order to comport with the Fourteenth Amendment, so long as the differences between the rich and poor do not "amount to a denial of due process or an invidious discrimination." *Id.* at 356-57 (citations omitted). It held, in *Anders*, that the Constitution required "substantial equality and fair process," which can only be attained if counsel "acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae." *Id.* at 744.

Against this backdrop of equal protection and due process concerns, the *Anders* court articulated a procedure for counsel to follow in cases where an indigent criminal defendant's appointed counsel determines that an appeal would be without merit. It stated that where counsel, after a conscientious examination of the record, finds his indigent client's criminal appeal to be wholly frivolous, counsel should advise the court of that fact and request to withdraw. *Id.* The request to withdraw must be accompanied by "a brief referring to anything in the record that might arguably support the appeal," and that brief must be supplied to the defendant, who then must be permitted to raise any points he chooses. *Id.* The appellate court must then conduct a "full examination of the proceedings" in order to determine whether counsel's determination that the case is wholly without merit is correct. *Id.* If the appellate court concludes that counsel's

no-merit representation is correct, it may grant counsel's request to withdraw and dismiss the appeal, unless state law requires it to proceed to a decision on the merits. If, on the other hand, it finds "any of the legal points arguable on their merits," the court must afford the indigent defendant counsel to argue the appeal before rendering its decision. *Id.*<sup>1</sup>

This Court reaffirmed *Anders*' equal protection rationale in *McCoy v. Wisconsin*, 486 U.S. 429 (1988). There, appointed counsel challenged a state supreme court rule requiring counsel seeking to withdraw to submit a brief to the court that included an explanation regarding why issues that " 'might arguably support the appeal' " lacked merit. *Id.* at 430 (citation omitted). This Court stated that "[t]he principle of substantial equality" requires appointed counsel to make the same "diligent and thorough evaluation of the case" as retained counsel before concluding that an appeal would be frivolous; "[e]very advocate has essentially the same professional responsibility whether he or she accepted a retainer from a paying client or an appointment from a court." *Id.* at 438. This Court held that Wisconsin's rule requiring appointed counsel to explain why his client's appeal lacks merit

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<sup>1</sup> The *Anders* court was not unanimous. In dissent, Justice Stewart, joined by Justice Black and Justice Harlan, found the no-merit letter procedure free of constitutional error. *Id.* at 747. Justice Stewart characterized the requirement imposed by the majority as "quixotic" and observed that it was based on the "cynical assumption that an appointed lawyer's professional representation to an appellate court in a 'no-merit' letter is not to be trusted." *Id.* at 746-47.

"furthers the same interests that are served by the minimum requirements of *Anders*," because it "provides an additional safeguard against mistaken conclusions by counsel that the strongest arguments he or she can find are frivolous." *Id.* at 442.

This Court acknowledged, in *McCoy*, that no-merit briefs are "seldom, if ever" filed by retained counsel. *Id.* at 438. Obviously, this is because "the wealthy client can always seek a second opinion and might well find a lawyer who in good conscience believes it to have arguable merit." *Id.* at 451 (Brennan, J., dissenting). Moreover, if retained counsel finds an appeal to be frivolous, he or she can simply inform the client of that fact and withdraw from the case. Unlike appointed counsel, retained counsel need not seek permission from the court to withdraw. Additionally, in the case of defendants who cannot afford to hire counsel, the court is the appointing authority, fulfilling the constitutional requirement of providing counsel on appeal. Where appointed counsel submits a brief raising no issues, it is incumbent on the appellate court to review the record; the same is not true for defendants with retained counsel. Thus, retained counsel need not comply with the dictates of *Anders* when withdrawing from representing a defendant in a frivolous appeal. See *People v. Placencia*, 11 Cal. Rptr. 2d 727 (1992) (retained counsel not required to follow *Anders* procedures); *Johnson v. State*, 885 S.W.2d 641, 645 (Tex. App. 1994) (the procedural safeguards of *Anders* do not apply to retained counsel). This conclusion is clearly accurate given the intent of *Anders* and its progeny to protect the indigent defendant.

#### B. *Robbins v. Smith*.

In *Robbins v. Smith*, the Ninth Circuit held that, to comply with *Anders*, appointed counsel must state arguable issues in a no-merit brief. 152 F.3d at 1067. The defendant's appointed counsel thoroughly reviewed the record and concluded that defendant's appeal was without merit, the defendant filed a brief on his own behalf, and the state court had reviewed this together with counsel's no-merit brief and the entire record and found that no arguable issues existed for appeal. The defendant filed a federal habeas corpus action alleging, among other claims, that his appointed counsel had not complied with the dictates of *Anders*.

Despite the fact that the viability of the defendant's appeal had been repeatedly and meticulously reviewed at the state level, the federal district court conducted its own thorough review of the state record and found two issues that it believed to be "arguable."<sup>2</sup> That court held that the case should be returned to state court for a new appeal.

The Ninth Circuit upheld the district court's determination that the defendant's appointed counsel had not complied with *Anders* and that two arguable issues existed for appeal. The court also held that the district court erred in failing to consider the defendant's exhausted claims of constitutional error contained in his petition. *Id.*

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<sup>2</sup> An "arguable" issue is defined, for purposes of California law, as one that has some potential for success, some possibility of a result requiring reversal or modification of the judgment. See *Robbins*, 152 F.3d at 1067 (citing *People v. Johnson*, 123 Cal. App. 3d 106, 109 (1981)).



at 1068-69. The court ruled that the defendant was entitled to a new appeal, based on the violation of *Anders* and the fact that two arguable issues existed, but that the case should be remanded to state court for that appeal only if none of his exhausted claims of constitutional error had merit. *Id.*

**C. The Practical Effect of *Robbins*: A Far Cry From Simply Assuring Substantial Equality Among Criminal Defendants in Prosecuting Their Appeals.**

*Robbins* in effect requires federal courts to review the entire state court record in search of arguable issues in *Anders* cases where none have been stated on appeal by appointed counsel or found to exist by the state appellate courts. This results in substantial *inequality* rather than *equality* among criminal defendants, and runs afoul of the very intent of *Anders* and its progeny.

Unlike indigent defendants whose counsel file no-merit briefs, indigent defendants whose appointed counsel file merit briefs are not entitled to a thorough review of their entire case in state court in search of arguable issues. In addition, federal courts do not comb the record for issues in cases where appointed counsel file merit briefs, because this Court has held that appointed counsel's decision regarding which issues to raise is normally conclusive. See *Jones v. Barnes*, 463 U.S. 745 (1983). If, after reviewing the state court record, appointed counsel decides there is a single arguable issue on appeal, regardless of its potential for success, the state court is not required to scour the case for additional arguable issues, nor is the defendant entitled to federal court review of

the record under *Robbins*. As a consequence of *Robbins*, indigent defendants would always be better served if their appointed counsel filed no-merit briefs rather than merit briefs, because a no-merit brief would entitle them to thorough review of the case not only in state court, but in federal court as well. Therefore, counsel would be doing his client a disservice by filing anything other than an *Anders* brief. Creating or compounding inequities between indigent defendants in this manner is clearly contrary to the intent of this Court as expressed in *Anders*.

Indigent defendants whose appointed counsel file *Anders* briefs are already entitled to a tier of state court review unavailable to indigent defendants whose counsel file merit briefs, and, obviously, to defendants whose retained counsel file briefs on the merits or no briefs at all. Entitling those indigent defendants whose counsel file *Anders* briefs to still *another* level of review of their cases in search of arguable issues does not ensure that they are treated equally, but instead bestows upon them more rights than other criminal defendants possess, which is clearly not the intent of *Anders*.

Moreover, if all indigent defendants filed *Anders* briefs to obtain better review of their cases at the state and federal level, state courts would be forced to review the entire record in search of arguable issues in the vast majority of criminal appeals. The Amici Curiae States simply cannot afford to devote their scarce judicial resources to such an exhaustive endeavor.

This Court has emphasized the importance of the state's right to assure the finality of its convictions,

stating, that "[t]he states possess primary authority for defining and enforcing the criminal law. . . . Federal intrusions into state criminal trials frustrate both the states' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)). See also *Coleman v. Thompson*, 501 U.S. 722, 748 (1991); *McCleskey v. Zant*, 499 U.S. 467, 487 (1991). This Court has also often recognized the collateral, and somewhat limited, nature of federal habeas corpus review of state court convictions, referring to direct appeal in state court as "the primary avenue for review of a conviction or sentence," to which a "presumption of finality and legality attaches." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). As such, this Court has stated that the role of federal habeas corpus proceedings is "secondary and limited," because "[f]ederal courts are not forums in which to relitigate state trials." *Id.*

With this in mind, principles of comity clearly require federal courts to defer to the determination of the state courts whether issues exist for appeal. The procedure sanctioned in *Robbins*, whereby the federal court reviews the entire state court record, in habeas corpus cases, in search of arguable issues, usurps the state court's power to enforce its criminal laws and to punish its offenders, and misconstrues the role of the federal courts in habeas corpus cases. This is particularly true in states where collateral review is available to litigate claims of ineffective assistance of counsel on appeal.<sup>3</sup> In

<sup>3</sup> See, e.g., *State v. Herrera*, 905 P.2d 1377 (Ariz. App. 1995) (allegation of ineffective assistance of appellate counsel is

those states, the performance of appointed counsel on appeal can be fully scrutinized, without the involvement of the federal courts.

**D. Retroactive Application of *Robbins* Will Severely Debilitate the Federal Courts and the State Appellate Courts in Jurisdictions Where the *Anders* Procedures are Similar to California's.**

Federal habeas corpus is a collateral remedy; it is not a substitute for direct review. This Court has never held that the purpose of federal habeas corpus is to address "a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error." *Teague v. Lane*, 489 U.S. 288, 308 (1989) (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 447 (1986)). Rather, the purpose of federal habeas corpus review is to provide an incentive for all trial and appellate courts to "conduct their proceedings in a manner consistent with established constitutional standards." *Id.* at 306 (citations omitted). This "deterrence function" is only served by demanding that courts adhere to the constitutional standards in place at the time of the original proceedings. *Id.* Thus, new constitutional rules of criminal procedure cannot be retroactively applied upon federal habeas corpus review unless the new rule falls within one of two very narrow exceptions.<sup>4</sup> *Id.* at 310.

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encompassed within ARIZ. R. CRIM. P. 32.1 as a claim that the conviction or sentence was in violation of the federal or state constitution).

<sup>4</sup> Specifically, a new rule should be applied retroactively on federal habeas corpus review if: (1) it places "certain kinds of

A case announces a new rule when it "breaks new ground or imposes a new obligation on the State or the Federal Government." *Id.* at 300. In other words, a case announces a new rule if the "result was not dictated by precedent existing at the time the defendant's conviction became final." *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994) (quoting *Teague*, 489 U.S. at 301) (emphasis in original). This principle ensures respect for the finality of state convictions and minimizes the costs to the states of having to continually relitigate convictions and sentences:

"[S]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands."

*Teague*, 489 U.S. at 308-10 (quoting *Engle v. Issac*, 456 U.S. at 128 n.33); see also *Lockhart v. Fretwell*, 506 U.S. 364, 372-73 (1993) (*Teague* "new rule" doctrine inapplicable to decisions favoring state because states' interests in comity and finality are not diminished by applying a favorable "new rule"); *Butler v. McKellar*, 494 U.S. 407, 414 (1990) ("new rule" principle validates "reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions").

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primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague*, 489 U.S. at 307 (citation omitted); or (2) if it requires the observance of "those procedures that . . . are implicit in the concept of ordered liberty." *Id.* (citations omitted.)

Because Respondent came to the federal courts on collateral habeas review, he may not obtain federal relief "unless it can be said that a state court, at the time the conviction or sentence became final, would have acted objectively unreasonably by not extending the relief later sought in federal court." *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997); see also *Lambrix v. Singletary*, 520 U.S. 518, 527-28 (1997) (the issue is whether the unlawfulness of the prisoner's conviction was apparent to "all reasonable jurists"). Habeas relief is proper only if a state court considering the prisoner's claim at the time the conviction became final would have felt *compelled* by existing precedent to conclude that the rule sought was required by the Constitution. *Gray v. Netherland*, 518 U.S. 152, 166 (1996); (quoting *Saffle v. Parks*, 494 U.S. 484, 488 (1990)).

Under this analysis, it is clear that *Robbins* announced a new rule and therefore cannot be applied retroactively. California's procedure governing no-merit briefs, which *Robbins* rejected as unconstitutional, has been in place since 1979. See *People v. Wende*, 600 P.2d 1071 (Cal. 1979). Other states have, for many years, employed procedures similar to California's without successful constitutional challenge. Like California, those states do not require counsel to state frivolous issues in order to comply with *Anders*; they allow counsel to file a brief containing only the factual and procedural background of the case. See, e.g., *State v. Balfour*, 814 P.2d 1069, 1079-80 (Or. 1991); *State v. Clark*, 287 Ariz. Adv. Rep. 7, 8 n. 1 (Ariz. Ct. App. Jan. 19, 1999) (attached as Appendix A). In fact, in *State v. Clark*, the Arizona Court of Appeals recently reaffirmed the constitutionality of Arizona's no-merit procedure, specifically rejecting the *Robbins* court's determination



that the procedure is constitutionally inadequate. *Clark*, 287 Ariz. Adv. Rep. at 12.

It is clear that the rule articulated in *Robbins* was not dictated by precedent existing at the time that defendant's conviction became final. Nor can it be stated that state courts considering claims that no-merit procedures, such as California's, did not comply with *Anders* would have been compelled to agree. Thus, *Robbins* announced a new rule which cannot be applied retroactively.

Moreover, retroactive application of *Robbins* will result in an avalanche of federal habeas corpus petitions filed by inmates whose appointed counsel followed state procedures existing at the time of their convictions, and therefore did not state arguable issues in a no-merit brief. *Robbins* will require federal courts to search state court records in each of those cases for any arguable appellate issue. This will cripple the federal courts whose jurisdictions include states following no-merit procedures similar to California's. Such review by the federal courts will undoubtedly result in a deluge of cases returning to state court for new appeals, years after convictions and first direct appeals, for the purpose of litigating frivolous, although arguable, appellate issues. In states such as Arizona, where more than 20 percent of the criminal appeals are *Anders* cases,<sup>5</sup> relitigation of those cases on

<sup>5</sup> The proportion of no-merit appeals to all criminal appeals is similarly significant in other states: Arkansas (13.33% in Ct. of App.); Florida (16.72% in 1st Dis. Ct. App., 34.19% in 5th Dis. Ct. App.); Illinois (31% in App. Dist. I); Iowa (18% in S. Ct.); Louisiana (13.4% in 3rd Cir., 25.9% in 4th Cir., 16.5% in 5th Cir.); New York (12% in App. Dis. IV); Ohio (16% in 2d Dis. Ct. App.);

appeal would cripple the state appellate court system, to the detriment of criminal defendants, indigent or not.<sup>6</sup>

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Oregon (19% in Ct. App.); South Carolina (39% in S. Ct.); Texas (14.3% in 6th Dis. Ct. App.); Virginia (10% in Ct. App.); Washington (23.4% in App. Div. III); and Wisconsin (15.9% in Ct. App.). These figures are based on 1993-94 statistics, and were published in the following article: Martha Warner, *Anders in the Fifty States: Some Appellants' Equal Protection is More Equal Than Others*, 23 Fla. St. U. L. Rev. 625 (1996).

<sup>6</sup> The provisions of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) did not apply in *Robbins* because that defendant's habeas corpus petition was filed before April 1, 1996. The Ninth Circuit has recently held, however, that *Robbins* is applicable to cases subject to the AEDPA, despite the more deferential standard of review afforded state court determinations of federal law by 28 U.S.C. § 2254(d)(1). See *Delgado v. Lewis*, 168 F.3d 1148, 1154 (9th Cir. 1999); *Davis v. Kramer*, 167 F.3d 494, 498 (9th Cir. 1999), petition for certiorari filed Mar. 8, 1999 (67 USLW 3570). In these cases, the Ninth Circuit held that a no-merit procedure that does not require appointed counsel to raise arguable issues "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States." Thus, federal courts will also be compelled to search the record in post-AEDPA cases for arguable, although probably frivolous issues, and, if such issues are discovered, those cases will also return to state court for new appeals.

**CONCLUSION**

The judgment of the Ninth Circuit Court of Appeals  
should be reversed.

Respectfully submitted,

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**APPENDIX A**

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 97-0673
Appellee,	)	DEPARTMENT E
v.	)	OPINION
HOWARD JAMES CLARK,	)	
Appellant.	)	
_____	)	

Appeal from the Superior Court of Maricopa County

Cause No. CR 96-12400

The Honorable Alfred J. Rogers, Judge

and

The Honorable Michael A. Yarnell, Judge

AFFIRMED

Janet A. Napolitano, Arizona Attorney General  
by Paul J. McMurdie, Chief Counsel, Criminal Appeals  
Section

Colleen L. French, Assistant Attorney General  
Attorneys for Appellee Phoenix

Dean W. Trebesch, Maricopa County Public Defender  
by James H. Kemper, Deputy Public Defender  
Attorney for Appellant Phoenix

Howard James Clark  
*In Propria Persona* Florence

RYAN, Judge



¶ 1 Howard James Clark appeals from his convictions and sentences for one count of attempted first degree murder, a class two, nonrepetitive, dangerous felony, and one count of aggravated assault, a class three, nonrepetitive, dangerous felony. Counsel for Clark has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), stating that he has searched the record and found no arguable question of law upon which an appeal can be based. Clark filed a supplemental brief *in propria persona* ("pro per").

¶ 2 Recently, the Ninth Circuit Court of Appeals held that compliance with *Anders* requires counsel to set forth an arguable issue or issues in the brief. *Robbins v. Smith*, 152 F.3d 1062 (9th Cir. 1998), *amending* 125 F.3d 831 (9th Cir. 1997). Under *Penson v. Ohio*, 488 U.S. 75 (1988), we ordered the parties to file supplemental briefs addressing whether this court's procedure,<sup>1</sup> which does not require appointed counsel to allege arguable issues if counsel determines none exist, complies with *Anders* in light of the *Robbins* decision. Counsel responded and we publish this decision to guide appointed counsel in the preparation of an indigent appellant's brief after counsel has determined there are no arguable issues to the appeal.

<sup>1</sup> See *State v. Scott*, 187 Ariz. 474, 478 n.4, 930 P.2d 551, 555 n.4 (App. 1996) ("When filing an *Anders* brief in Maricopa County, rather than articulate 'arguable issues,' counsel typically present a detailed statement of facts and procedure with appropriate references to the trial record. These statements serve the same purposes as identifying arguable issues by demonstrating that counsel has thoroughly reviewed the record, and by aiding this court in our own review.").

## I.

¶ 3 Clark, almost sixty and legally blind, lived alone in a trailer and conducted a mechanic's business. As a result of his blindness, numerous friends stopped by from time to time to assist Clark with his daily tasks. One of these friends introduced Clark to M. L.<sup>2</sup> M. L. offered to stay with Clark to help him with his problems and his business. Clark accepted.

¶ 4 After M. L. had roomed with Clark for several weeks he invited a friend, E. S., to visit him. On the night of November 18, 1996, M. L., E. S., and several others had a party in Clark's trailer. Clark was visiting a friend that night and did not return home until the early morning hours of the next day.

¶ 5 That next day, two of his neighbors, Nellie Saliva and Michelle Parker, found E. S. behind the bar in Clark's trailer. Nellie and Michelle knew that Clark allowed no one behind the bar because he kept his personal things there. Suspicious, the pair followed E. S. into Clark's bedroom. There they saw that E. S. had packed several of Clark's things into her duffel bag and seemed to be preparing to leave. Michelle told Clark, who confronted E. S.

¶ 6 E. S. insisted she was not attempting to steal anything. Clark became angry and threw a tape case at her, striking her. Upset, E. S. ran from the trailer. Outside, M. L. was working on one of the vehicles that Clark had

<sup>2</sup> We use initials to protect the privacy of the victims.

accepted for repair. E. S. ran past M. L., who followed her to determine what was wrong.

¶ 7 Clark then stepped out onto the porch of his trailer with a pistol. He yelled to M. L. to bring E. S. back so he could shoot her. Clark pointed the pistol in their direction. M. L. told Clark that he could not shoot because M. L. was in the way. Clark responded, "Fine, I'll shoot you." Clark fired and the bullet ricocheted off a nearby vehicle and struck M. L. in the back.

¶ 8 E. S. ran to a convenience market across from Clark's trailer and called 911. Eventually, M. L. also made it to the convenience market. The paramedics arrived and M. L. was taken to the hospital. He was treated and released the following morning.

¶ 9 In the meantime, Maricopa County deputy sheriffs had arrived and contacted Clark. Clark, now alone in his trailer, denied shooting M. L. but refused to come out and talk with police. Clark told the police that he had a flamethrower and explosives in the trailer and that he had a hostage. The deputies did not know if Clark was telling the truth, and a two-and-a-half hour stand-off ensued. Finally, Deputy David Head arrived and talked Clark into surrendering. The deputies never recovered the weapon used to shoot M. L.

¶ 10 Clark was indicted on one count of attempted first degree murder, one count of attempted second degree murder (later withdrawn), and one count of aggravated assault. At trial, M. L. and E. S. testified that Clark had pointed a pistol at them and fired, hitting M. L. Both witnesses were certain that Clark was the one that shot M. L. In addition, the State presented evidence that Clark

made phone calls from jail to ask a friend to make E. S. "disappear" before she could testify. There was also evidence that Clark offered to send M. L. to California at the time of trial to prevent him from testifying.

¶ 11 Clark defended on the basis that a "Mexican man" had actually shot M. L. Clark claimed that the man was a friend of M. L.'s who became upset when the drug deal they were transacting turned sour. Previously, on cross-examination, Clark's counsel had brought out that M. L. had seven baggies of methamphetamine when he was shot.

¶ 12 The jury convicted Clark of the two charges. The trial court sentenced Clark to concurrent, presumptive terms of 10.5 years on the attempted murder charge and 7.5 years on the aggravated assault charge. Clark appeals. We have jurisdiction under article 6, section 9 of the Arizona Constitution and Arizona Revised Statutes Annotated ("A.R.S.") sections 12-120.21, 13-4031, and 13-4033.

## II.

¶ 13 We first discuss the question whether this court's procedure for dealing with *Anders* appeals is constitutional in light of the *Robbins* decision. In *Robbins*, appointed counsel, following the procedure approved by the California Supreme Court in *People v. Wende*, 600 P.2d 1071 (Cal. 1979), filed a brief in the California Court of Appeal "which briefly outlined the facts surrounding Robbins's trial and failed to present any possible grounds for appeal." 152 F.3d at 1064. Counsel also asked the court to review the record for arguable issues and promised to

remain available to address any issues found by the court. *Id.* The *Robbins* court held that this procedure failed to comply with *Anders* because counsel "completely failed to identify any grounds that arguably supported an appeal." *Id.* at 1067. It thus affirmed the federal district court's grant of habeas corpus relief. *Id.* at 1069.

¶ 14 We think our court's procedure, much like the procedure used in other jurisdictions, better appreciates appointed counsel's ethical obligations while still providing indigent appellants their constitutional rights to counsel, due process, and equal protection. We disagree with the *Robbins* decision and accordingly decline to follow it. *See State v. Vickers*, 159 Ariz. 532, 543 n.2, 768 P.2d 1177, 1188 n.2 (1989) (declining to follow a Ninth Circuit opinion holding Arizona's death penalty statute unconstitutional because that opinion rested on "grounds on which different courts may reasonably hold different views of what the Constitution requires").

#### A.

¶ 15 In *Anders*, the United States Supreme Court first attempted to determine the extent of appointed appellate counsel's duty to "prosecute a first appeal from a criminal conviction, after that attorney has conscientiously determined that there is no merit to the indigent's appeal." 386 U.S. at 739. There, the defendant's court-appointed lawyer, following California's established procedures, wrote a letter advising the appellate court that he had concluded his client's appeal had no merit. *Id.* Simultaneously, he advised that court that the defendant wished to file a brief on his own behalf. After reviewing

the defendant's brief and the record, the California appellate court affirmed the conviction. *Id.* Subsequently, the defendant filed a habeas corpus petition with the California Supreme Court. The California Supreme Court also affirmed defendant's conviction. *Id.* at 740-41. The United States Supreme Court reversed, holding:

On a petition for a writ of habeas corpus some six years later [the court] found the appeal had no merit. It failed, however, to say whether it was frivolous or not, but, after consideration, simply found the petition to be "without merit." The [California] Supreme Court, in dismissing this habeas corpus application, gave no reason at all for its decision and so we do not know the basis for its action. We cannot say that there was a finding of frivolity by either of the California courts or that counsel acted in any greater capacity than merely as *amicus curiae*. . . . Hence California's procedure did not furnish petitioner with counsel acting in the role of an advocate nor did it provide that full consideration and resolution of the matter as is obtained when counsel is acting in that capacity.

*Id.* at 743. The Court concluded that such an approach "does not comport with fair procedure and lacks that equality that is required by the Fourteenth Amendment." *Id.* at 741.

¶ 16 The Court then reviewed the line of cases dealing with an indigent defendant's appellate rights. *See, e.g., Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (necessity of providing a transcript for indigent defendants on appeal);



*Douglas v. California*, 372 U.S. 353, 357-58 (1963) (appointment of counsel on appeal). Relying on the equal protection rationale of these decisions, the Court described what is required of appointed appellate counsel when counsel determines no serious basis for the indigent's appeal exists:

The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae*. The no-merit letter and the procedure it triggers do not reach that dignity. Counsel should, and can with honor and without conflict, be of more assistance to his client and to the court. His role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court – not counsel – then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it

must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a non-indigent defendant is able to obtain. It would also induce the court to pursue all the more vigorously its own review because of the ready references not only to the record, but also to the legal authorities as furnished it by counsel. The no-merit letter, on the other hand, affords neither the client nor the court any aid. The former must shift entirely for himself while the court has only the cold record which it must review without the help of an advocate. Moreover, such handling would tend to protect counsel from the constantly increasing charge that he was ineffective and had not handled the case with that diligence to which an indigent defendant is entitled. This procedure will assure penniless defendants the same rights and opportunities on appeal – as nearly as is practicable – as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel.

*Anders*, 386 U.S. at 744-45 (footnote omitted).

¶ 17 Although *Anders* implicated a defendant's rights to due process and counsel, the central principle that *Anders* sought to vindicate was equal protection. Thus, an indigent criminal defendant and a non-indigent defendant must be afforded the same basic means of presenting an appeal. Those means necessarily included an attorney to advocate on the defendant's behalf.

¶ 18 The Court reaffirmed *Anders*' equal protection rationale in *McCoy v. Wisconsin*, 486 U.S. 429 (1988). In *McCoy*, appointed counsel challenged a Wisconsin Supreme Court rule that required counsel seeking to withdraw to submit a brief to the court that included an explanation as to why issues that " 'might arguably support the appeal' " lacked merit. *Id.* at 430 (citation omitted). In deciding the issue the Court stated:

The principle of substantial equality . . . require[s] that appointed counsel make the same diligent and thorough evaluation of the case as a retained lawyer before concluding that an appeal is frivolous. Every advocate has essentially the same professional responsibility whether he or she accepted a retainer from a paying client or an appointment from a court. The appellate lawyer must master the trial record, thoroughly research the law, and exercise judgment in identifying the arguments that may be advanced on appeal. In preparing and evaluating the case, and in advising the client as to the prospects for success, counsel must consistently serve the client's interest to the best of his or her ability. Only after such an evaluation has led counsel to the conclusion that the appeal is "wholly frivolous" is counsel justified in making a motion to withdraw.

*Id.* at 438-39 (footnote omitted).

¶ 19 The Court additionally noted that the "*Anders* brief is designed to assure the court that the indigent defendant's constitutional rights have not been violated." *Id.* at 442. The Court continued:

To satisfy federal constitutional concerns, an appellate court faces two interrelated tasks as it

rules on counsel's motion to withdraw. First, it must satisfy itself that the attorney has provided the client with a diligent and thorough search of the record for any arguable claim that might support the client's appeal. Second, it must determine whether counsel has correctly concluded that the appeal is frivolous.

*Id.* This language implicated the indigent's Sixth Amendment right to counsel. The Court sought to make certain that an indigent appellant's right to equal protection had substance; thus, it required appellate courts to use the *Anders* procedure to ensure that appointed counsel effectively performed requisite legal duties. Because the Wisconsin rule facilitated the appellate court's determination on counsel's adequacy and did not violate the defendant's constitutional rights, the Court upheld the rule.

¶ 20 The Court reiterated an indigent defendant's right to effective counsel on appeal in *Penson*, 488 U.S. at 75. In *Penson*, after the indigent petitioner and two co-defendants were found guilty of crimes in an Ohio state court, appellate counsel filed a document captioned "Certification of Meritless Appeal and Motion in the Ohio Court of Appeals." *Id.* at 77. The certificate indicated that counsel had carefully reviewed the record and found no errors requiring reversal. He also requested leave to withdraw. *Id.* at 78.

¶ 21 The Ohio appellate court granted the motion to withdraw and specified that the court would independently review the record to determine whether any reversible error existed. *Id.* After examining the record, the Ohio appellate court found that counsel's certification of meritlessness was " 'highly questionable' " and that

" 'several arguable claims' " existed. *Id.* at 79 (citations omitted). In fact, it reversed one of petitioner's convictions for plain error. However, the court concluded that petitioner suffered no prejudice as a result of counsel's performance because the court had thoroughly examined the record. The court affirmed petitioner's remaining convictions and the Ohio Supreme Court dismissed the appeal. *Id.*

¶ 22 On review, the United States Supreme Court held that the petitioner was deprived of equal protection and the right to counsel because the procedures used in Penson's case failed to comply with the constitutional requirements set forth in *Anders*. First, appointed counsel's motion did not identify anything in the record that might arguably support the appeal. *Id.* at 81. Second, the Ohio appellate court ruled on the motion to withdraw before making its own examination of the case to determine if counsel had correctly determined the appeal was frivolous. *Id.* at 82-83. These errors prevented the *Anders* brief from achieving its purpose. The Court again explained that the two functions of the *Anders* brief were to provide an appellate court with a basis for determining whether appointed counsel had performed his duty to support his client's appeal to the best of his ability, and to help the appellate court make its own determination that the appeal was indeed frivolous. *Id.* at 82.

¶ 23 The Court also stated that the Ohio court erred by failing to appoint new counsel after it had determined that several arguable claims capable of supporting the appeal existed. *Id.* at 83. Because our system of justice is premised on adversarial presentation, a defendant's right to counsel can be vindicated only by an active advocate

on his behalf. *Id.* at 84-85. The Court, therefore, concluded that an appellate court's review would not suffice to protect the indigent's constitutional rights when its review uncovered an "arguable" issue. *Id.* at 86-87.

¶ 24 Taken together, *Anders*, *McCoy*, and *Penson* set forth the constitutional minimums to ensure indigent defendants their rights to counsel, equal protection, and due process when counsel determines that no meritorious issues exist to appeal. The *Anders* line of decisions outlines a procedure that must be followed to ensure compliance with these minimum constitutional standards. Under this procedure, appointed counsel will not be permitted to withdraw unless counsel first files a brief that indicates to the appellate court that counsel has diligently attempted to find an arguable issue for the defendant. The appellate court then reviews the record to ensure counsel's diligence. If the court finds an arguable issue, it must direct counsel to assist the defendant in presenting this argument. Only if it finds no arguable issue may the court permit the indigent's appointed counsel to withdraw.

## B.

¶ 25 Unfortunately, *Anders*' guarantee of equal and effective counsel has created a fundamental conflict between compliance with the Constitution's requirements and appointed counsel's ethical obligations. Simply stated, if counsel has concluded that the appeal is "wholly frivolous," counsel has also necessarily concluded that nothing in the record exists that might "arguably support" the appeal. If counsel must file a brief



after determining that the appeal has no merit, that brief may ultimately be a brief against the client.<sup>3</sup> By filing a "no-merit" brief, counsel is put in the uncomfortable, possibly unethical position of arguing against the client's interests.

¶ 26 The issue then becomes what exactly counsel must do to satisfy the constitutional requirements of *Anders* without running afoul of ethical obligations to the court and the defendant. Different jurisdictions have developed various approaches to resolve this problem. See generally, Martha C. Warner, *Anders in the Fifty States: Some Appellants' Equal Protection is More Equal Than Others'*, 23 FLA. ST. U. L. REV. 625, 669-87 (1996).

¶ 27 Several of the federal circuits require literal compliance, that is, a brief with pertinent cites to legal authority raising any "arguable" issues – notwithstanding counsel's ethical obligations. See, e.g., *Robbins*, 152 F.3d at 1067; *United States v. Pippen*, 115 F.3d 422, 426 (7th Cir. 1997) (the brief must identify, with record references and legal citations, possible grounds for error along with an argument for reversal and the reason why such an argument would be frivolous);<sup>4</sup> *United States v. Zuluaga*, 981 F.2d 74,

<sup>3</sup> This is precisely what lawyers are required to do in Wisconsin. See *McCoy*, 486 U.S. at 440-41.

<sup>4</sup> Significantly, the Seventh Circuit does not conduct a complete independent review of the record but confines itself to issues raised and argued in the brief. *United States v. Wagner*, 103 F.3d 551, 553 (7th Cir. 1996). In *Wagner*, Judge Posner wrote that

[i]f in light of this scrutiny it is apparent that the lawyer's discussion of the issues that he chose to discuss is responsible and if there is nothing in the

75 (2d Cir. 1992) (brief must include references to the record and citations to legal authorities). Some states have adopted this logic as well and have rules explicitly detailing what is required in *Anders* briefs. See Warner, *supra*, at 653 nn.223 & 224; (citing ARK. R. APP. P. 4-3(j); DEL. SUP. CT. R. 26(c); IOWA R. APP. P. 104; MICH. CT. R. 7.211(c)(5); R. OKLA. CT. CRIM. APP. 3.6(B)).<sup>5</sup>

¶ 28 Other states do not permit appointed counsel to withdraw from representing indigents on appeal, but require counsel to brief the case on the merits. See, e.g., *State v. McKenney*, 568 P.2d 1213, 1214-15 (Idaho 1977); *Commonwealth v. Moffett*, 418 N.E.2d 585, 590-91 (Mass. 1981). However, in some of the states that do not permit counsel to withdraw, courts allow counsel to file a brief containing only the factual and procedural background of the case without raising frivolous issues. See, e.g., *Wende*, 600 P.2d at 1075; *State v. Balfour*, 814 P.2d 1069, 1079-80 (Or. 1991). Finally, a number of states have abandoned the *Anders* procedure altogether. See Warner, *supra*, at 651

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district court's decision to suggest that there are other issues the brief should have discussed, we shall have enough basis for confidence in the lawyer's competence to forgo scrutiny of the rest of the record.

*Id.*

<sup>5</sup> At least one commentator has noted that detailed briefing requirements frequently result in a "merits" brief being filed instead of an *Anders* brief. Filing a merits brief confines the appellate court's review to only those issues raised in the brief – in many cases reducing the appellate court's review of the record. See Warner, *supra*, at 653 n.223, 654 n.225; see also Scott, 187 Ariz. at 478, 930 P.2d at 555.

(noting that *Anders* briefs are not filed in Alaska, Hawaii, Kansas, Maryland, New Jersey, and Nebraska).

¶ 29 This variety of approaches reveals an underlying tension in the *Anders* procedure. While the Supreme Court has the authority to determine constitutional issues, it is up to the states to determine the proper ethical rules for attorneys practicing within their jurisdiction. See, e.g., *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) (recognizing that states have compelling interest in regulating the practice of law in their courts). Indeed, the continued survival of the various approaches suggests that the Supreme Court recognizes that there is more than one acceptable way to resolve the conflict between counsel's ethical obligations and an indigent defendant's right to effective appellate representation. Thus, as long as a jurisdiction affords indigent defendants their rights to counsel, equal protection, and due process, it may determine the proper ethical course for appointed appellate counsel who conclude that only frivolous issues exist on appeal. Within this authority, we believe this court's approach satisfactorily reconciles *Anders*' constitutional concerns with counsel's ethical obligations.

### C.

¶ 30 Under our procedure, when appointed counsel determines that a defendant's case discloses no arguable issues for appeal, counsel files an *Anders* brief. The brief contains a detailed factual and procedural history of the case, with citations to the record. See *Scott*, 187 Ariz. at 478 n.4, 930 P.2d at 555 n.4. Counsel submits the brief to

the court and the defendant. The defendant is then given the opportunity to file a brief *pro per*. After receiving all briefing, the court reviews the entire record for reversible error. If any arguable issue presents itself, the court directs appointed counsel to brief the issue. Only after the court has ascertained that counsel has conscientiously performed his or her duty to review the record, and has itself reviewed the record for reversible error and found none, will the court allow counsel to withdraw. See *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). We conclude that this procedure permits counsel to perform ethically, while simultaneously ensuring that an indigent defendant's constitutional rights to due process, equal protection, and effective assistance of counsel are protected.

¶ 31 We believe our procedure is appropriate for two reasons. First, the procedure does not run afoul of appointed counsel's ethical obligations. Under Arizona's ethical rules, a lawyer may not assert frivolous claims or defenses. See ARIZ. R. SUP. CT. 42 (professional conduct), Ethical Rule ("ER") 3.1 (meritorious claims and contentions); see also ER 3.3 (candor to the tribunal). Literal compliance with *Anders*' command to raise all arguable issues, notwithstanding their merit, would cause appellate counsel to violate his or her ethical obligations. See ER 1.16(a) ("[A] lawyer shall . . . withdraw from the representation of a client if: (1) the representation will result in violation of the Rules of Professional Conduct. . . ."). For this reason, we do not require the brief to contain non-meritorious arguments. Moreover, requiring the brief to contain non-meritorious arguments, together

with citation to legal authority indicating why such arguments are frivolous,<sup>6</sup> would negatively affect appointed counsel's relationship with the defendant. The client might not believe that counsel behaved as a zealous advocate on behalf of the client if counsel's brief contained reasons for the appellate court to affirm the client's conviction.<sup>7</sup>

¶ 32 Second, our procedure adequately protects the indigent defendant's rights to counsel, equal protection, and due process established by *Anders*, *McCoy*, and *Pen-son*. By requiring counsel to file an *Anders* brief setting forth a detailed factual and procedural history of the case with citations to the record, this court can satisfy itself that counsel has in fact thoroughly reviewed the record. This requirement assures that appointed counsel has diligently provided substantially equal representation to the indigent defendant. In addition, these citations to the record assist the court in determining whether counsel correctly concluded that the appeal is indeed frivolous.

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<sup>6</sup> Our ethical rules require an attorney to include citation to authority that proves the argument is frivolous. See ER 3.3(a)(3) ("A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel . . .").

<sup>7</sup> We note that *McCoy* approved of, but did not require, this result. 486 U.S. at 443-44 (noting only that the Wisconsin procedure requiring the attorney to outline why the appeal is frivolous did no injury to *Anders*' constitutional requirements). We think the better practice is to avoid requiring appointed counsel to brief the case against his or her client.

¶ 33 Requiring a detailed history with the appropriate citations for appellate review fulfills the two functions of *Pen-son* (demonstrating that counsel has thoroughly reviewed the record and that the appeal is so frivolous that it may be decided without further adversarial presentation), 488 U.S. at 81-82, while avoiding the ethical dilemma of briefing the case against the defendant. Cf. *Balfour*, 814 P.2d at 1079-80 (holding that brief containing only a statement of the case, with a statement of the facts, was sufficient to protect an indigent defendant's rights to counsel and equal protection, where counsel is not permitted to withdraw). Thus, our procedure assures adequate representation, yet still provides the adversarial presentation mandated by *Pen-son* if an arguable issue is found by the court. See 488 U.S. at 84.

¶ 34 In addition, under our procedure, counsel cannot withdraw until after the court of appeals has conducted its review. *Shattuck*, 140 Ariz. at 584-85, 684 P.2d at 156-57.<sup>8</sup> If the court finds an arguable issue, it will order appointed counsel to brief the issue.

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<sup>8</sup> The decision not to allow appointed counsel to withdraw is supported by other jurisdictions and the American Bar Association Standards For Criminal Justice. See A.B.A. Stand. for Crim. Justice § 4-8.3 (3d ed. 1993) ("Appellate counsel should not seek to withdraw from a case solely on the basis of his or her own determination that the appeal lacks merit."). In addition, section 21-3.2(b) (2d ed. 1980 & Supp. 1986) provides as follows:

(i) . . . Counsel should endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance.



¶ 35 Moreover, if the defendant perceives that counsel has not effectively assisted in the presentation of his appeal, the defendant may petition for post-conviction relief under our rules. *See State v. Herrera*, 183 Ariz. 642, 905 P.2d 1377 (App. 1995) (holding that an allegation of ineffective assistance of appellate counsel is encompassed within ARIZ. R. CRIM. P. 32.1 as a claim that the conviction or sentence was in violation of the federal or state constitution). This procedure provides additional scrutiny of appointed counsel's and the court's determination that the appeal is frivolous.

¶ 36 As previously noted, the court itself reviews the record for reversible error. This review gives the indigent appellant at least one, and as many as four,<sup>9</sup> additional lawyers searching the record for error. We believe this extensive review assists in protecting an indigent defendant's rights to equal protection and due process.<sup>10</sup>

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(ii) If the client chooses to proceed with an appeal against the advice of counsel, counsel should present the case, so long as such advocacy does not involve deception of the court. When counsel cannot continue without misleading the court, counsel may request permission to withdraw.

<sup>9</sup> Those four include the law clerk or staff attorney assigned to review the case and the three judges assigned to decide it.

<sup>10</sup> Some courts have recognized an anomaly created by *Anders*. The court in *Wagner* described the review process as multiple-lawyer overkill that "gives the indigent defendant more than he could expect had counsel (whether retained or appointed) decided to press the appeal." 103 F.3d at 552. *See also Wende*, 600 P.2d at 1075 ("We recognize that under this rule counsel may ultimately be able to secure a more complete review for his client when he cannot find any arguable issues

¶ 37 Finally, we note that the appellate structure we have "provides the indigent appellant with at least the same rights that an appellant with the funds to hire counsel would have, i.e., an advocate on the appellant's behalf active to the permissible ethical limit." *Balfour*, 814 P.2d at 1081. Our procedure complies with *Anders*' constitutional requirements by requiring appointed counsel to perform his or her functions in a conscientious, ethical and diligent manner. Moreover, this court's review both assures counsel's compliance with these constitutional standards and provides the indigent defendant with an exhaustive search of the record for error.

¶ 38 We thus conclude that our procedure protects an indigent appellant's rights to counsel, equal protection, and due process – *Anders* requires no more. Accordingly, we decline to follow *Robbins*.

### III.

¶ 39 In his *pro per* brief, Clark raises several issues on appeal. First, Clark claims that the arraignment judge told him he was guilty and that this prejudiced him. Second, Clark asserts that the victims only testified under duress from the police. Third, Clark complains that Detective Sears implied to the grand jury that Clark could actually see, that he was a "good actor." Fourth, Clark claims that the court erred by admitting only a part of his

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than when he raises specific issues, for a review of the entire record is not necessarily required in the latter situation."). Since the repeal of A.R.S. section 13-4035, which required this court to review the record for fundamental error in all criminal cases, that same anomaly exists here.

conversation with the sheriff's office dispatcher. Fifth, Clark argues that the trial court violated his speedy trial rights when it forced him to proceed with current counsel rather than allowing him to proceed with new counsel or in *pro per*. Finally, Clark complains that he has not received enough assistance from the prison to meet his special needs in preparing his appeal.

¶ 40 After reviewing the record, we find that it does not support Clark's first two arguments. First, no evidence supports that the arraignment judge told Clark he was guilty, nor that prejudice resulted from such a statement. Second, no evidence exists to show the police coerced any of the State's witnesses. Thus, neither of these arguments supplies an adequate basis for reversing the jury's verdicts.

¶ 41 Clark's third argument asserts that the grand jury would not have indicted him if Detective Sears had testified truthfully regarding Clark's inability to see. We cannot review a defendant's claim that the grand jury did not have probable cause to indict him following a finding of guilt beyond a reasonable doubt. *State v. Gonzales*, 181 Ariz. 502, 507, 892 P.2d 838, 843 (1995); *State v. Charo*, 156 Ariz. 561, 566, 754 P.2d 288, 293 (1988). In any event, Detective Sears testified to the grand jury that Clark was legally blind.

¶ 42 Clark's fourth argument, that the trial court erroneously admitted only a portion of his conversation with the sheriff's office dispatcher, similarly lacks merit. The trial court heard the entire tape during argument on Clark's motion for a new trial and did not believe the

evidence warranted a new trial. Clark's rationale for asking for the excluded portions of the tape was that it corroborated Clark's testimony that he never admitted shooting M. L. However, other witnesses at trial corroborated Clark's testimony on this point, including Sergeant Watsak, the officer talking to Clark during the stand-off. Clark was not deprived of his ability to fairly and effectively present his case by the admission of only portions of the tape.

¶ 43 Clark's fifth argument is that the trial court violated his speedy trial rights. Before trial, defense counsel and the State jointly requested a continuance to enable them to more effectively prepare their cases. The court asked Clark if he would agree to waive the requested extension of time for speedy trial purposes. Clark refused. Clark demanded an immediate trial and offered to handle the case *pro per*, or alternatively, wanted different counsel appointed so he could have an immediate trial.

¶ 44 We review a trial court's decision granting a continuance to allow counsel adequate time to prepare a case for an abuse of discretion. *State v. McWilliams*, 103 Ariz. 500, 501-02, 446 P.2d 229, 230-31 (1968); *State v. LeVar*, 98 Ariz. 217, 220-21, 403 P.2d 532, 535 (1965). "When defense counsel states that he is not adequately or fully prepared on the eve of trial, where the lack of preparation is not due to an absence of diligence on his part, a trial judge does not err in continuing the matter." *State v. Smith*, 146 Ariz. 325, 326-27, 705 P.2d 1376, 1377-78 (App. 1985). This result does not change even if the defendant insists on an immediate trial. *Id.* at 327, 705 P.2d at 1378. Thus, we will affirm a trial court's decision granting a continuance,

despite a defendant's insistence on an immediate trial, when the facts indicate that defense counsel needs more time to prepare and no evidence exists of a lack of diligence by counsel.

¶ 45 The trial court granted the joint motion for a continuance and denied Clark's motion to proceed *pro per* or to retain new counsel. The court stated that defense counsel was "an experienced and very competent attorney in these matters," and found that the continuance was justified by "extraordinary circumstances and in the interest of justice." It further stated:

I have carefully weighed the issue of the defendant's desire to go to trial immediately – though his desire to go to trial immediately or represent himself or have counsel is all inconsistent with an immediate trial – and the defendant's constitutional right to at least adequate representation by counsel. I find specifically representation by counsel is more important in this case than trying the case precipitously, either with or without counsel.

Thus, the trial court determined that defense counsel had adequately represented the defendant but that he needed more time to effectively prepare his case. Accordingly, it did not abuse its discretion by granting the joint motion for a continuance or denying Clark's motion for new counsel.<sup>11</sup>

<sup>11</sup> We note that the prosecutor joined in the motion to continue due to a scheduling conflict. A trial court may find that a prosecutor's scheduling conflict constitutes extraordinary circumstances justifying the continuance of a defendant's trial. See *State v. Mendoza*, 170 Ariz. 184, 194, 823 P.2d 51, 61 (1992).

¶ 46 Finally, Clark claims that the prison denied him the assistance he needed to adequately prepare his supplemental brief. Specifically, Clark complains that due to his blindness he is entitled to have recordings of the entire trial or have someone read the transcripts to him; additionally, he requests that he be allowed to communicate with the court via tape recorded statements.

¶ 47 The Constitution requires that a prisoner be provided meaningful access to the courts. *Lewis v. Casey*, 518 U.S. 343, 350 (1996); *Bounds v. Smith*, 430 U.S. 817, 821, 828 (1977). A prisoner's right of access includes a right to have the transcripts of his trial made available to him. *Griffin*, 351 U.S. at 19. It also includes the right to access a law library or have legal assistance provided, but only as a means for ensuring " 'a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.' " *Lewis*, 518 U.S. at 351 (quoting *Bounds*, 430 U.S. at 825). In other words, a prisoner must demonstrate not only a denial of meaningful access but also that the denial has actually injured his ability to present a meritorious argument to the court. *Id.*

¶ 48 The record does not support Clark's contention that he has been denied meaningful access to the court. First, Clark received copies of the transcripts of his trial. Second, since his counsel's *Anders* brief was filed on February 17, 1998, Clark has filed four documents, including one in which he asked to have considered as his supplemental brief, with this court. These documents reference legal authority and indicate his familiarity with the record. Far from indicating a denial of meaningful access, these pleadings reveal that the prison is providing Clark ample opportunity and assistance to pursue his



appeal. Finally, in recognition of Clark's blindness, we granted Clark two extensions of time to file his brief. Thus, from this record, Clark has been given meaningful access to the court.

¶ 49 In addition, Clark has not indicated an actual injury resulting from his alleged denial of access to the court. To show actual injury, Clark must demonstrate that the denial prevented him from asserting some legitimately appealable issue. *Id.* He cannot do so. Appointed counsel filed an *Anders* appeal on his behalf. Clark himself filed a supplemental brief. We have considered and addressed his arguments. Also, we have reviewed the record for reversible error and have found none. Clark cannot show any injury from his alleged denial of access to the court.

#### IV.

¶ 50 In summary, we conclude that our procedure for deciding non-meritorious appeals fully complies with the requirements of *Anders*. Thus we decline to follow the Ninth Circuit's decision in *Robbins*. We have also thoroughly reviewed the record and find no reversible error. The record shows that Clark was represented by counsel at all stages of the proceedings and on appeal, and that the trial court afforded Clark all of his rights under the constitution, our statutes, and the Arizona Rules of Criminal Procedure. The evidence supports the jury's verdict, and the sentence imposed falls within the range prescribed by law.

¶ 51 Upon the filing of this decision, counsel's obligations pertaining to the representation of Clark in this

appeal have come to an end. Counsel need do no more than inform Clark of the status of his appeal and of his future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. See *Shattuck*, 140 Ariz. at 584-85, 684 P.2d at 156-57. Clark shall have thirty days from the date of this decision in which to proceed, if he desires, with a *pro per* motion for reconsideration or petition for review.

¶ 52 We affirm Clark's convictions and sentences.

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MICHAEL D. RYAN, Presiding Judge

CONCURRING:

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CECIL B. PATTERSON, JR., Judge

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JEFFERSON L. LANKFORD, Judge

(19498)

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Supreme Court, U.S.  
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No. 98-1037

In The  
**Supreme Court of the United States**

October Term, 1998

GEORGE SMITH, Warden,

*Petitioner,*

v.

LEE ROBBINS,

*Respondent.*

On Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit

BRIEF OF AMICUS CURIAE  
IN SUPPORT OF PETITIONER

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## INTEREST OF AMICUS CURIAE

The California Academy of Appellate Lawyers is an organization of over 100 appellate practitioners from throughout the state of California which concerns itself with issues in the appellate process.<sup>1</sup>

There are Academy members among those accepting appointments from the California state appellate courts to represent indigent clients in appeals from criminal convictions, among the members of the state's Appellate Indigent Defense Oversight Advisory Committee which reports to the Chief Justice of the California Supreme Court, and among those employed in the administration of California's appellate "projects." These five offices are nonprofit organizations which contract with the state Administrative Office of the Courts to administer the panel of attorneys who accept appointments in non-capital indigent criminal appeals in each of the six California Court of Appeal districts. Among other duties, each "project" (1) develops and maintains a panel of private attorneys who wish to accept indigent criminal appointments in the district, (2) matches attorneys to appellate cases based on the perceived difficulty of the case and the experience and skills of counsel, and (3) reviews and evaluates the work of counsel to provide quality control and to inform future appointments.

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<sup>1</sup> In conformity with Rule 37.6, the California Academy of Appellate Lawyers informs the Court that no counsel for any party to this matter authored the brief in whole or in part, and that no person or entity other than the Academy made a monetary contribution to the preparation or submission of the brief.

Inasmuch as the decision of the Ninth Circuit Court of Appeals in this case would invalidate the existing procedure for "no-merit" appeals in California cases involving indigent defendants, the Academy and its members are immediately affected by it and concerned about the impact it will have on the California appellate system.

The parties to this matter have consented to the filing of this amicus brief as provided in Rule of Court 37(a).

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### SUMMARY OF ARGUMENT

In *Anders v. California*, 386 U.S. 738 at 744 (1967), this Court held that the Fourteenth Amendment gives the indigent criminal defendant the right to counsel on appeal who "support his client's appeal to the best of his ability" even when appellate counsel concludes that the appeal is "wholly frivolous . . . ." In the decades since *Anders*, California's courts have developed a process for dealing with no-merit appeals which ensures that the goal this Court set in *Anders* is met with a high degree of efficiency and effectiveness. The California process, as it operates under *People v. Wende*, 25 Cal.3d 436, 158 Cal.Rptr. 839 (1979):

(1) supplements the full judicial review of the record required by *Anders* in no-merit cases with an additional layer of review through the system of "appellate projects" which provide monitoring, assistance and support of appointed counsel on appeal,

(2) requires counsel to write a brief presenting the facts of the case to the appellate court without declaring the appeal to be frivolous or arguing against her client, and, therefore,

(3) does not require counsel to withdraw after filing the no-merit brief. California thus provides *heightened* review through its system of assisted appellate counsel, and makes it possible to ensure indigent defendants continuity of counsel in such cases.

California's process thus offers effective protection for the due process and equal protection rights of indigent defendants while promoting judicial efficiency. The California system should be preserved; and the decision of the Ninth Circuit Court of Appeals which condemns it must therefore be reversed.

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### ARGUMENT

**CALIFORNIA'S PROCEDURE FOR HANDLING NO-MERIT APPEALS IN NON-CAPITAL, CRIMINAL CASES MEETS THE GOAL OF THIS COURT'S ANDERS DECISION EFFECTIVELY AND EFFICIENTLY.**

#### A. *Anders* and its progeny.

In *Anders v. California*, 386 U.S. 738, *supra*, this Court first concerned itself with

"the scope of court-appointed appellate counsel's duty to an indigent client after counsel has conscientiously determined that the indigent's appeal is wholly frivolous."

*McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429 at 430 (1988).

This Court held in *Anders* that even in such a case, the Fourteenth Amendment requires that appointed counsel "support his client's appeal to the best of his ability," 386 U.S. at 744, in order to

"assure penniless defendants the same rights and opportunities on appeal - as nearly as is practicable - as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel."

386 U.S. at 745.

The specific question in *Anders* was whether appointed counsel could "withdraw by simply advising the court of his or her conclusion" that the appeal was frivolous. This Court held in response that counsel should be allowed to withdraw only after filing "a brief referring to anything in the record that might arguably support the appeal." *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. at 430, quoting *Anders v. California*, 386 U.S. at 744, *supra*. This Court went on to explain in *McCoy* that the purpose of an *Anders* brief is to give the appellate court a sound basis for conclusions on two issues:

"First, it must satisfy itself that the attorney has provided the client with a diligent and thorough search of the record for any arguable claim that might support the client's appeal. Second, it must determine whether counsel has correctly concluded that the appeal is frivolous."

486 U.S. at 440.

In *McCoy*, this Court considered whether Wisconsin's procedure for dealing with no-merit appeals met this standard. Wisconsin's rules required that an appointed attorney finding an appeal frivolous and seeking withdrawal not only state "anything in the record that might arguably support the appeal," but also "a discussion of why the issue lacks merit." 486 U.S. at 431. This Court found that the additional requirement, while not necessary to meet the demands of "substantial equality and fair procedure" embodied in the Fourteenth Amendment, is not inconsistent with them. 485 U.S. at 435-36. The Court thus made it clear that *Anders* not require lock-step uniformity in State responses to the need for due process in no-merit appeals.

In *Penson v. Ohio*, 488 U.S. 75 (1988), on the other hand, this Court found that the Ohio procedure did not meet the *Anders* standard because the Ohio court (1) allowed counsel to withdraw before determining whether counsel's evaluation of the appeal as frivolous was sound, and (2) decided the appeal on the merits without appointing new counsel after finding arguable appellate issues.

#### **B. The California process for no-merit appeals.**

This Court demonstrated in *McCoy* and *Penson* that *Anders* did not establish a rigid formula for dealing with no-merit appeals with which all states would have to comply, but a guideline which allows each state to fashion its own procedure, provided that it gives indigent defendants the "substantial equality and fair procedure" required by the Fourteenth Amendment. 485 U.S. at 435.



The California procedure is different from those previously considered by this Court in that it allows counsel who find no arguable issues to remain on the case rather than withdraw. Like the Wisconsin procedure found sufficient by this Court in *McCoy*, however, the California process fully meets the requirements of due process and equal protection.

Under California's procedure, counsel who are unable to find any arguable issues in the record are required to prepare a brief setting forth the facts and procedural history of the case and requesting that the court conduct an independent review of the record. *People v. Feggans*, 67 Cal.2d 444, 447-448, 62 Cal.Rptr.2d 444 (1967); *People v. Wende*, 25 Cal.3d 436, 158 Cal.Rptr. 839 (1979); *In re Sade C.*, 13 Cal.4th 952, 55 Cal.Rptr. 771 (1996). The court then conducts such a review, and if it finds that an arguable issue exists, instructs counsel to brief that issue for the court. Alternatively, new counsel may be appointed for this purpose. *Wende*, 25 Cal.3d, at p. 442.

*Wende* expressly prohibits counsel from arguing against their clients, *id.*, 25 Cal.3d, at 440, and states that an attorney who declares the appeal to be frivolous is disqualified and must request withdrawal. However, it also allows counsel to avoid disqualification by simply presenting the case to the court without argument and without declaring the appeal to be frivolous, thereby making continuity of representation possible in case the appellate court does find arguable issues. *Id.*, at p. 442. Consistent with that approach, *Wende* does not require

appointed counsel to list the issues which counsel considered and rejected, or to cite authorities supporting counsel's decision not to brief those issues. *Ibid.*

The State's Administrative Office of the Courts has contracted with five appellate projects (nonprofit organizations with independent directors) to administer indigent criminal appeals arising in each of California's appellate districts. The projects, staffed by attorneys who specialize in criminal appeals, arrange for the appointment of counsel with skills and experience appropriate to the complexity of the particular case and then monitor counsel's representation as the case progresses.

Appointed counsel are prohibited from filing no-merit briefs without first consulting with the projects, and, as a matter of standard practice, a project staff attorney reviews the record (or selected portions of it) first before a *Wende* brief is filed. The project attorney's review searches not just for clearly reversible errors but, as defense advocates, for any "arguable" issues. Thus, this process provides a significant additional level of protection in assuring competent representation in non-capital, indigent criminal appeals.

Petitioner has ably made the legal arguments in support of the issuance of the petition. Accordingly, amicus will not reargue the legal issues discussed by petitioner, but will instead attempt to assist the court by providing additional information regarding California's system of appellate projects, the procedures employed in California no-merit appeals, and the manner in which this state has

balanced the needs of the courts, the constitutional interests of indigent appellants, and the duties of loyalty and confidentiality which counsel owe to their clients.

### 1. The California appellate project system.

In 1967, when *Anders* and *Feggans* were decided, indigent criminal appeals in California were administered directly by the California Courts of Appeal. The courts themselves appointed private counsel, decided the appeals, and compensated counsel for their services. In no-merit appeals prior to *Anders* and *Feggans*, counsel submitted a no-merit letter and the case was concluded. After these two cases were decided, counsel was required to prepare a brief to assist the court, and the court conducted its own independent review of the record to ensure no arguable issues had been missed. *Wende*, 25 Cal.3d, at p. 440.

In 1985 the California Judicial Council adopted California Rule of Court 76.5, which authorized the Courts of Appeal to "contract with an administrator having substantial experience in handling criminal appeals" to handle the administrative functions formerly performed by the courts themselves. See also, Standards of Judicial Administration, Std. 20. Within a few years, appellate projects were established to administer indigent appeals in all six California appellate court districts.

All non-capital indigent criminal appeals in California are now administered through the appellate project system, as are most appeals in civil juvenile delinquency and dependency proceedings. The projects currently

administer a caseload of approximately 10,000 appeals each year. This represents more than half of all the appeals – civil and criminal – filed in all appellate districts in the state of California. *Court Statistics Report*, Judicial Council of California, vol. 1, p. 24 (1998). The projects perform a large number of administrative and training services and also provide direct representation in some cases.

Every notice of appeal filed by a defendant who has been convicted of a criminal offense is referred by the respective Court of Appeal to the appropriate appellate project. The project then conducts an initial review of the case and matches the case with an attorney whose skill and experience are appropriate to the particular case.

This "matching" function is one of the most critical services which the projects provide. The projects maintain individual panels of attorneys who are ranked in categories ranging from Level 1, comprising those attorneys who are essentially beginners, to Level 5, comprising the most skilled and experienced attorneys. The projects share information regarding their respective panels, and each panel attorney's work product is evaluated in every case to determine whether the attorney's current ranking is appropriate.

Upon receiving the notice of appeal in a case, the projects evaluate the case and categorize it according to a variety of factors, including the nature of the charges of which the appellant was convicted, the length of the sentence imposed, whether the case was tried to the court or a jury, the length of the record, and a number of other considerations. The project then contacts an attorney in

the appropriate skill category and assigns the case to him or her.

The projects assign cases on either an "independent" or an "assisted" basis. In an "independent" case, the panel attorney provides all legal services required by the case, but also sends a copy of each document which has been filed with the court to the assigning project. The staff attorney reviews these documents in order to prepare an evaluation of the attorney's work and to evaluate the attorney's claim for compensation. In addition, panel attorneys in independent cases are encouraged to consult with the project staff attorney assigned to the case on difficult legal or ethical issues which may arise.

Only relatively skilled and experienced attorneys are assigned cases on an "independent" basis, roughly 60% of the cases. The remaining 40% of the cases are assigned to relatively less experienced attorneys on an "assisted" basis. In an "assisted" case, an experienced project staff attorney conducts an extensive initial review of the record and prepares a memorandum to the panel attorney on issues the project attorney has identified. The panel attorney then separately reviews the record, and prepares a draft of the opening brief. The opening brief is then reviewed by the project attorney prior to filing. The project attorney also reviews other documents, such as reply briefs and petitions for review, and may attend oral argument in order to monitor the attorney's performance.

The development of the project system has greatly professionalized criminal appellate practice in California. In addition to the individual case instruction, the projects also provide resource materials and regular training, or

continuing legal education, sessions for panel members on both substantive and procedural topics. The courts maintain ongoing supervision of the appellate project system through the California Judicial Council and the Administrative Office of the Courts, the administrative arm of the California judicial branch. In addition, the chief justice of the California Supreme Court has created a 10-member Appellate Indigent Defense Oversight Advisory Committee, comprised of six appellate court justices, two appellate project directors, and two appellate practitioners, to monitor the work of the projects. This committee meets on a quarterly basis and performs a detailed audit of randomly selected, recently closed cases within the appellate project system; this audit is addressed to both the nature of work and hours billed by appointed counsel and to the administrative oversight provided by the projects. Based on its review of California's non-capital, appointed appellate counsel system, the committee reports its recommendations regarding potential changes in the system to the Chief Justice of California and the Administrative Presiding Justices of the California Courts of Appeal.

## **2. California's procedure in no-merit appeals.**

The degree of project supervision in *Wende* cases depends upon whether the case has been assigned on an "independent" or an "assisted" basis.

In an "independent" case, the attorney may not file a *Wende* brief without first consulting the project staff attorney and receiving permission to file a no-merit brief. As a matter of standard practice, either the panel attorney will



request that the project attorney review the entire record or selected portions of it or the project attorney will make that request. This provides a second opinion regarding issues the panel attorney has considered and rejected.

In an "assisted" case, the project's review is much more involved. Not only must the panel attorney consult with the project attorney before filing a no-merit brief, the project staff attorney will also normally conduct a complete review of the record to ensure that the panel attorney has not missed any arguable issues. Only then may the attorney file a brief requesting that the court review the record to determine whether there are any arguable issues.

The California appellate project system provides at least as much, and perhaps more, protection of the Sixth Amendment interests of indigent criminal appellants as this court contemplated at the time of *Anders*. The system first provides "front-end" insurance that the attorney appointed to represent an indigent appellant has the appropriate qualifications, training, and skills to provide legal services in each case. The system also provides additional "back-end" protections. If a complete review of the record and the relevant authorities convinces the panel attorney that a no-merit brief is appropriate, his or her decision is again reviewed by the appellate project staff attorney before any such brief is filed. Only then is the case finally presented to the Court of Appeal, which conducts its own independent review of the record to determine whether the panel attorney and the project attorney have missed any arguable issues.

In reality, the California system provides the indigent appellant with not merely one review by a competent attorney but two, plus, pursuant to *Anders*, an additional review of the record performed by the Court of Appeal. Appointed counsel's decision is second-guessed by the appellate project staff attorney, and their judgment is then "third-guessed" by the court itself.

The California courts have concluded that the requirements of *Wende*, when coupled with the project review process, results both in thorough record review and protection of indigent appellants' Sixth Amendment rights. *In re Sade C.*, 13 Cal.4th at pp. 980-981, 990-991. This point was made explicit in three recent decisions of the California Court of Appeal:

"Pursuant to rule 76.5, and with funding from the Legislature, the Judicial Council provided each Court of Appeal with an appellate project administrator and experienced staff to administer the court-appointed counsel program for each court. (It bears noting that this has been done at a not-inconsiderable cost to the taxpayers. In fiscal 1993-1994, for example, the cost for the appellate project statewide was approximately \$11 million or nearly one-third of the total outlay for court-appointed counsel in the Courts of Appeal.)

The agency which operates in this District is the First District Appellate Project (FDAP). We are confident that FDAP employs both able and experienced lawyers in criminal law to assist and, where appropriate, supervise appointed counsel. FDAP and, as we understand it, the other appellate project administrators, are under contract to the court; their contractual duties

include review of the records to assist court-appointed counsel in identifying issues to brief. If the court-appointed counsel can find no meritorious issue to raise and decides to file a *Wende* brief, an appellate project staff attorney reviews the record again to determine whether a *Wende* brief is appropriate. Thus, by the time the *Wende* brief is filed in the Court of Appeal, the record in the case has been reviewed both by the court-appointed counsel (who is presumably well qualified to handle the case) and by an experienced attorney on the staff of FDAP. In our view, this double review provides more than sufficient assurance that the record in each respective appeal has been carefully examined for error and, therefore, that a conclusion by counsel that the appeal is without merit is one upon which this court can and should rely."

(*People v. Hackett*, 36 Cal.App.4th 1297, 1311-1312 (1995).)

" . . . when we receive a *Wende* brief from one of these [attorneys appointed through the project process], we are assured that in fact the record has been sifted, potential issues for review have been analyzed, and the conclusion reached that there are no issues for review is professionally sustainable. Beyond this, we know that before a *Wende* brief is submitted it, as well as the record on which it is based, has been reviewed by an experienced [project attorney]."

(*In re Angelica V.*, 39 Cal.App.4th 1007, 1015 (1995).)

Finally, the California Court of Appeal, Second Appellate District (the court in which the instant case arose) has voiced similar confidence in the projects' *Wende* review procedures. In a 1995 case, Division Three

of that court, in an opinion by Associate Justice Walter Croskey, noted that the California Appellate Project/Los Angeles "employs some of the state's most able and experienced lawyers in criminal and juvenile law to assist and, where appropriate, supervise appointed counsel." It is these lawyers who review the record before a *Wende* brief is submitted. (*In re Sade C.*, 38 Cal.Rptr.2d 822, 835, fn. 16 (1995).<sup>2</sup>)

### C. California's current process for no-merit appeals meets the *Anders* standard.

In its opinion below, the Ninth Circuit found the California process objectionable because California does not require appointed counsel to list the issues which counsel considered and rejected, or to cite authorities supporting counsel's decision not to brief those issues. *Robbins v. Smith*, 152 F.3d 1062, 1067 (9th Cir. 1998). The Ninth Circuit's error was to look at that particular facet of the California system in isolation from the system as a whole, and to conclude that the California process cannot stand because this Court has held in previous cases that States must require appointed counsel to present the appellate court with a discussion of issues considered and rejected before withdrawing from the case.

---

<sup>2</sup> The Court of Appeal version of *Sade C.* was superseded by a grant of review and subsequent decision of the California Supreme Court. Under California Rule of Court 976, the case may not be cited as authority. Reference to the footnote discussed in the text is included here for reasons unrelated to the holding of the case.

The Ninth Circuit's approach ignores the crucial fact that the current California system is fundamentally different from those previously reviewed by this Court. While in all of the systems previously reviewed appointed counsel respond to no-merit appeals by declaring them to be frivolous and withdrawing from the case, California now has an integrated system which provides, not for withdrawal of counsel, but for continuity of representation for indigent defendants by counsel assisted and supported by the Appellate Projects.

The *Wende* court recognized that there are sound practical reasons for preserving continuity of counsel in no-merit as in other cases. *Ibid.*; see, also, *Suggs v. United States*, 391 F.2d 971, 977-978 (D.C. Cir. 1968); ABA Project on Standards for Crim. Justice, Stds. Relating to Crim. Appeals (Approved Draft 1970) std. 3.2. *Wende* therefore makes it possible for counsel in no-merit appeals to stay on the case by allowing them to present those appeals to the appellate courts *without* having to disable themselves from continuing as counsel by declaring the appeals to be frivolous or otherwise discussing the weakness of the indigent appellant's case.

If counsel has disabled himself from continuing on a case and the court discovers an arguable issue which counsel missed, new counsel must be appointed to brief the issue. To do so, this successor attorney must review the same appellate record which the original attorney has already reviewed, and appellate records often run into the thousands of pages and require many hours to review. Successor counsel must also establish a working relationship with the client. All of these services are both

time-consuming and costly, since the court must ultimately compensate both attorneys.

The California procedure avoids other ethical complications as well. For example, when an appointed attorney concludes there are no arguable issues on appeal and submits the case to the Court of Appeal, the court is then placed in the awkward position of reviewing a record to locate legal issues which it must then eventually decide. Indeed, this problem was raised in the dissent of California Supreme Court Justice William Clark when *Wende* itself was decided.

"The majority now require an appellate court to abandon its traditional role as an adjudicatory body and to enter the appellate arena as an advocate. Whatever the right of a person convicted of crime to an appeal, an appellate court cannot be burdened first, with determining what contentions should be urged on appeal and then, with resolving those contentions."

(*People v. Wende*, 25 Cal.3d at pp. 443-444 [conc. and dis. opn. of Clark, J.]; see, also, *People v. Hackett*, 36 Cal.App.4th 1297, 1302, *supra*.)

The review performed by California's appellate projects helps to insulate the courts from being placed in this difficult position. The appellate project staff attorney who performs the second review shares the ethical obligations to the client which apply to the appointed attorney himself.

The importance of this consideration should not be underestimated. An attorney is sometimes obliged not to



raise an issue which might otherwise appear to be arguable or even meritorious due to information outside the record on appeal or instructions he has received from his client. Appointed counsel can share this information with project staff counsel without breaching his duty to the client, and staff counsel can consider that information in reviewing the appointed attorney's decision. Of course, neither attorney could ever share such information with the court itself without violating the duty of confidentiality.

In addition, the projects' ethical duties to the client place them in a better position than the courts themselves to acquire a complete grasp of the appellant's case. Not only may the projects communicate with appointed appellate counsel, they may also communicate with trial counsel to obtain information which does not appear on the face of the record itself but which may affect the decision to raise or not raise particular issues. The courts are not in this position. Indeed, trial counsel's duty to protect his client's interests prohibit him from communicating with the court on such issues. Accordingly, the projects provide an additional safeguard of indigent appellants Fourteenth Amendment rights.

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### CONCLUSION

California's procedure in non-capital, no-merit cases achieves the goal set by this Court for the representation of indigent criminal appellants in no-merit appeals. Taken as a whole, it provides California's appellate courts with

a sound basis for ensuring that "the attorney has provided the client with a diligent and thorough search of the record for any arguable claim," and that "counsel has correctly concluded that the appeal is frivolous." The decision of the Ninth Circuit to the contrary should be reversed.

Dated: April 22, 1999

Respectfully submitted,

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8

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**No. 98-1037**

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1998

\_\_\_\_\_  
GEORGE SMITH, Warden,

*Petitioner,*

vs.

LEE ROBBINS,

*Respondent.*

\_\_\_\_\_  
**On Writ of Certiorari to the  
United States Court of Appeals for the Ninth Circuit**

=====

**BRIEF *AMICUS CURIAE* OF THE  
CRIMINAL JUSTICE LEGAL FOUNDATION  
IN SUPPORT OF PETITIONER**

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3788

**QUESTION PRESENTED**

Should *Anders v. California* be modified or overruled?



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1998

GEORGE SMITH, Warden,

*Petitioner,*

vs.

LEE ROBBINS,

*Respondent.*

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**BRIEF AMICUS CURIAE OF THE  
CRIMINAL JUSTICE LEGAL FOUNDATION  
IN SUPPORT OF PETITIONER**

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**INTEREST OF AMICUS CURIAE**

The Criminal Justice Legal Foundation (CJLF)<sup>1</sup> is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society.

The considerable difficulties the courts and counsel have with frivolous indigent appeals, as demonstrated by the decision below, are contrary to the interests of society that CJLF was formed to protect.

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1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

## SUMMARY OF FACTS AND CASE

On December 31, 1988, defendant shot and killed his former roommate. Pet. for Cert. 2. He served as his own counsel at his trial in Los Angeles County Superior Court, *id.*, at 3, and was convicted of second-degree murder and grand theft auto. *Robbins v. Smith*, 152 F. 3d 1062, 1064 (CA9 1998).

Defendant was appointed counsel for his appeal. *Ibid.* Appellate counsel found that there were no nonfrivolous issues to appeal. Pet. for Cert. 3. Following the procedures established in *People v. Wende*, 25 Cal. 3d 436, 600 P. 2d 1071 (1979), appellate counsel filed a nonmerit brief with the Court of Appeal. Pet. for Cert. 3. It contained the procedural history of the case, a statement of facts, and a request that the Court of Appeal independently review the record for appealable issues. In an attached declaration, appellate counsel averred that he had reviewed the entire record, discussed the case with trial counsel, and told defendant of his right to request counsel's removal and file his own brief in propria persona. *Ibid.* Defendant filed a brief on his own behalf. *Ibid.* The appellate court, after independent review of the record, found that appellate counsel satisfied his duties, that the issues raised by defendant were unsupported by the record, and that there were no arguable issues to appeal. *Ibid.*

After exhausting his state remedies, defendant filed a federal habeas action on February 24, 1994. *Robbins, supra*, 152 F. 3d, at 1064. He claimed that state appellate counsel's withdrawal violated *Anders v. California*, 386 U. S. 738 (1967). On October 24, 1995, the District Court granted the habeas petition, effectively requiring the California Court of Appeal to hear defendant's direct appeal. *Id.*, at 1065. The Ninth Circuit affirmed, finding that the California procedure violated *Anders* because counsel's *Wende* brief had failed to "identify any grounds that arguably supported an appeal." *Id.*, at 1067. It also upheld the District Court's conclusion that there were two nonfrivolous issues: 1) the denial of defendant's attempt to withdraw the waiver of his right to counsel; and 2) the inadequacy of the county jail's library depriving him of his right to self-representation. *Ibid.*

## SUMMARY OF ARGUMENT

This Court has good reason to concern itself with wasting resources, as the judiciary is particularly vulnerable to resource limitations. Judicial decisionmaking is relatively expensive, and likely to get more expensive over time. The physical constraints upon the judiciary are particularly severe at the appellate level.

Frivolous appeals are thus a particularly important problem to attack. No legitimate interest is served by frivolous appeals. Because indigent criminal defendants have no incentive to forego frivolous appeals, this class of litigants is a singularly large source of frivolous appeals. Therefore, limiting frivolous defense appeals is a particularly fertile ground for saving scarce judicial resources.

*Anders v. California* exacerbates this problem by requiring appointed counsel confronted with a frivolous appeal to write an "impossible brief" that overburdens the courts and treats other defendants unfairly. The decision implicitly mistrusts the reliability of appointed counsel and presumes that retained counsel is willing to file anything for money, no matter how frivolous the appeal. Few attorneys are so unethical or incompetent.

The *Anders* brief imposes an impossible ethical dilemma between counsel's duty not to file frivolous claims, and the duty to act as advocate on behalf of the client. *Anders* also assumes that frivolous can be defined more precisely than reality allows. An issue either is or is not frivolous, if it might "arguably support the appeal" then it is no longer frivolous.

*Anders* also places too great a burden on the intermediate appellate courts by requiring them to search the record for appealable issues. Having courts act on behalf of indigent frivolous defendants in this manner creates equal protection problems, since nonindigent defendants and indigent defendants who file briefs on the merits do not get the same level of judicial scrutiny as *Anders* litigants.

*Stare decisis* is a rule of policy that should not prevent this Court from overruling or modifying *Anders*. There is no reliance interest in *Anders*, and it has caused considerable confusion. Given its high cost in wasted resources and the ethical dilemmas it causes, *Anders* should be abandoned.

## ARGUMENT

### **I. Appointed appellate counsel's duties to defendant should be defined in light of the limited resources available to the criminal justice system.**

Rights exist in a world governed by limited resources.

"Scarcity is a central fact of the human condition and the starting point for economic analysis. Legal services, like other goods, are affected by scarcity. The time of lawyers, judges, and court personnel is not unlimited, and society must determine how to allocate this good." Pritchard, *Auctioning Justice: Legal and Market Mechanisms for Allocating Criminal Appellate Counsel*, 34 *Am. Crim. L. Rev.* 1161, 1161 (1997).

This Court's decisions reflect the importance of accommodating rights to limited resources. The body of habeas corpus jurisprudence contains many references to prevent the waste of "scarce judicial resources" by limiting unnecessary litigation on habeas. See, e.g., *Keeney v. Tamayo-Reyes*, 504 U. S. 1, 7 (1992); *McCleskey v. Zant*, 499 U. S. 467, 491 (1991).

Habeas is not the only field in which this Court seeks to conserve scarce resources. It has strengthened the government's ability to enter and enforce plea bargains in part because these agreements allow "[j]udges and prosecutors to conserve vital and scarce resources." *Blackledge v. Allison*, 431 U. S. 63, 71 (1977). This Court takes a similarly practical approach to interlocutory appeals. It will not allow such appeals for the sole reason of correcting erroneous decisions, as doing so "would constitute an unjustified waste of scarce judicial resources." *Firestone Tire & Rubber Co. v. Risjord*, 449 U. S. 368, 378 (1981). Another example of the need to conserve judicial resources is found in a prisoner rights case, *Sandin v. Conner*, 515 U. S. 472 (1995). Among the reasons the *Sandin* Court chose to abandon the broad definition of state-created liberty interests announced in *Hewitt v. Helms*, 459 U. S. 460 (1983), was the fact that "the *Hewitt* approach has led to the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone." 515 U. S., at 482.

This Court has good reason to concern itself with wasting resources. While no institution is free of the constraints posed by a world of necessarily limited resources, the judiciary is particularly vulnerable. As an institution, the judiciary comes by its decisions very expensively. The rules and formalities that give courts their evenhandedness also make them very expensive when compared to other institutions, such as the market or the political process. See N. Komesar, *Imperfect Alternatives* 125 (1994). Inevitably, some decisions are kept from the courts because they are too costly to litigate. *Id.*, at 125-128.

The problem of cost is likely to worsen over time. Although precise estimates of the cost of judicial services are difficult, it is likely that the judiciary suffers from "cost disease." See Peacock, *Cost of Judicial Services*, in *The New Palsgrave Dictionary of Economics and the Law* 530, 531 (P. Newman ed. 1998).

"A well-known hypothesis . . . suggests that in the case of government provision of law and order, health and education, personal services are an integral part of output and this will limit the substitution of capital for labour. It seems inconceivable that judges trying cases or lawyers representing clients could be replaced by interacting computers which could produce justice, and in any event the quality of the service is perceived to be uniquely correlated with personal service. At the same time, the price of the labour services used in the provision of justice will depend on the value of these services in the economy as a whole. Judges and legal staff receive emoluments and status comparable with those which they would otherwise obtain as professional or corporate lawyers or in other professions where their skills and experience could be employed. It follows that as an economy grows and real wages increase, increases in costs per unit in, say, manufacturing output, will be offset by increases in productivity per head resulting from process innovations, whereas costs to secure judicial output are bound to rise, even if no extra inputs are required. If the growth in the economy is accompanied as already indicated, by an increase in the demand for the resolution of disputes and the growth in recorded crime and associated demand for



criminal proceedings, then expenditure on judicial services, in common with other forms of government expenditure embodying personal services, must have a tendency to rise at a faster rate of growth than national expenditure." *Ibid.* (citation omitted).

In practical terms, this means that the problem of overcrowded courts is not going away. Although demand for judicial services may consistently outstrip legal productivity, society will not devote an ever larger share of the economy to the law. In the end, some disputes will not make it to the courthouse. Any effort to make the legal system less wasteful can thus reap considerable rewards both economically and as a matter of justice.

Appellate courts are a particularly critical bottleneck. The hierarchical structure of appellate courts limits their physical capacity to resolve disputes. The apex, of each jurisdiction's system, this Court and the highest court of each state, has a fixed capacity to decide cases.

"The most obvious reform, increasing the number of judges on these high courts, does not easily or even necessarily increase the output of this court. While an increase in judges would decrease the per judge load of opinion writing, it would not decrease the time and effort necessary to reach a collective decision by this body. In fact, increasing the numbers would probably make such collective decisions more difficult and time consuming." Komesar, *supra*, at 144-145.

Increasing the size of the intermediate appellate courts is little better, as larger courts will inevitably create more conflicts that must be resolved by the Supreme Court. See *id.*, at 145. Thus "the main bottleneck [to the capacity of the judiciary]—is the appellate court system." *Id.*, at 144.

Checking frivolous appeals is one of the most efficient, least costly means for the judiciary to deal with its limited resources. A litigant who loses a frivolous claim loses nothing. See *Lewis v. Casey*, 518 U. S. 343, 353, n. 3 (1996). Nor does counsel have either the duty or the right to present frivolous claims. *United States v. Edwards*, 777 F. 2d 364, 365 (CA7 1985) (*per curiam*). Courts also have no interest in dealing with claims that never

should have been made. For every frivolous claim that is disposed of efficiently, attorney and judicial resources can be freed to deal with more worthy disputes. Discouraging frivolous appeals thus "furthers the State's interest in conserving judicial resources." See *Bankers Life & Casualty Co. v. Crenshaw*, 486 U. S. 71, 81-82 (1988).

Unfortunately, the decisions providing representation for indigent defendants for their first appeal makes frivolous appeals much more likely in these cases. The constitutionally necessary subsidy of *Douglas v. California*, 372 U. S. 353 (1963) and the other indigent appeal cases remove any incentive for an indigent defendant to forego a frivolous appeal, making the demand to pursue even the most unworthy appeal a rational choice for the indigent defendant. See Pritchard, *supra*, 34 Am. Crim. L. Rev., at 1167; Pengilly, *Never Cry Anders: The Ethical Dilemma of Counsel Appointed to Pursue a Frivolous Criminal Appeal*, 9 Crim. Just. J. 45, 46 (1986); C. Wolfram, *Modern Legal Ethics* 817 (1986). A similar problem afflicts this Court's *pro se* petitions.

"But paupers filing *pro se* petitions are not subject to the financial considerations—filing fees and attorney's fees—that deter other litigants from filing frivolous petitions. Every paper filed with the Clerk of this Court, no matter how repetitious or frivolous, requires some portion of the institution's limited resources. A part of the Court's responsibility is to see that these resources are allocated in a way that promotes the interests of justice. The continual processing of petitioner's frivolous requests for extraordinary writs does not promote the end." *In re McDonald*, 489 U. S. 180, 184 (1989) (*per curiam*).

The fact that Congress and the states are effectively compelled to provide resources for defendant's first appeal does not avoid the high costs of frivolous indigent appeals. "[J]udicial fiat cannot cure scarcity; it merely disguises the symptoms of the disease." Pritchard, *supra*, 34 Am. Crim. L. Rev., at 1162. Justice is not immune from economic realities.

"In ethical and legal discussion, 'justice' in adjudication is sometimes spoken of as though it were an impalpable or an absolute. In operational terms, which is to say eco-

conomic terms, it is surely not. In the doing of justice, as elsewhere, what can be obtained is limited by what can be funded. And if it is true that no amount of money can buy perfect juridical insight, it is clear enough that approximations of perfection in an organized social structure are possible only with substantial expenditure. Hence, all decisions about the measure of justice that should be accorded in the system are also decisions about public expenditure." Hazard, *Rationing Justice*, 8 J. L. & Econ. 1, 4 (1965).

Resources spent on indigent appeals must come from somewhere.

"[D]ecisions about the desired level of service in the public welfare program of administered justice are economically competitive with decisions to engage in other types of programs . . . . Hence, administered justice is a commodity for which differential preference has to be established by comparison with other possibilities." *Ibid.*

Because each extra indigent appeal will come at the expense of some other public good such as education, health, or defense, it is unrealistic to expect states or Congress to provide indigent criminal appellants with a level of funding that will give them some "perfect justice."

The resource limits on indigent appeals places most of the burden of frivolous appeals on indigent defendants with potentially valid appeals. If counsel for indigent defendants spend too much time on frivolous appeals "the people who will suffer the most are the indigent prisoners who have been *unjustly* convicted; they will languish in prison while lawyers devote time and energy to hopeless causes on a first come-first served basis." Doherty, *Wolf! Wolf!—The Ramification of Frivolous Appeals*, 59 J. Crim. L., Criminology & Police Sci. 1, 2 (1968) (emphasis in original).

Frivolous appeals harm those with valid claims even after briefs are filed. Every frivolous appeal reviewed by an appellate court further delays vindication for the improperly convicted defendant. Furthermore, these unnecessary cases harm other defendants in a more insidious way. There is an unavoidable cost

to crying wolf; if counsel for indigent defendants are forced to press frivolous appeals, then counsel's credibility before the intermediate appellate courts will diminish, harming those indigent defendants with potentially meritorious claims. See *ibid.*; Hermann, *Frivolous Criminal Appeals*, 47 N. Y. U. L. Rev. 701, 703 (1972).

Justice Jackson noted the problem of the many bad claims driving out the few good ones in the context of habeas corpus:

"It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search." *Brown v. Allen*, 344 U. S. 443, 537 (1953) (opinion concurring in result).

Improperly convicted defendants are not the only victims of frivolous appeals. Some prosecutorial resources will be wasted in dealing with frivolous claims. More importantly, judicial resources spent on frivolous cases will be diverted from all appeals, including civil and nonindigent criminal cases, delaying justice for every litigant and contributing to the ever-increasing strain on the judiciary's resources.

Unfortunately, the problem with frivolous indigent criminal appeals is significant.

"A significant amount of appellate judges' time is spent in reading two or more briefs, exchanging memoranda and perhaps writing an opinion in criminal cases which plainly lack any basis for reversal. Especially with regard to the federal appellate bench, it may fairly be said that most judges find the task at best bothersome and at worst infuriating."

Hermann, *supra*, 47 N. Y. U. L. Rev., at 702 (footnotes omitted); see also Pritchard, *supra*, 34 Am. Crim. L. Rev., at 1168-1169 (*Anders* has "driven the courts to judicial triage" leading fully briefed appeals to get less than complete attention); Warner, *Anders in the Fifty States: Some Appellants' Equal Protection is More Equal Than Others*, 23 Fla. St. U. L. Rev. 625, 625 (1996) (finding dealing with *Anders* briefs "[a] continuing source of frustration for the appellate judge").



The problem of frivolous appeals can be addressed by checking the indigent defendant's unconstrained interest in prosecuting all possible appeals without regard to their merit. Appointed counsel is the most logical choice to act as a gatekeeper. Unlike the client, counsel has an ethical duty to keep frivolous appeals out of the courts. See, e.g., ABA Model Rules of Professional Conduct, Rule 3.1 (1992); ABA Model Code of Professional Responsibility, DR 7-102(A)(2), EC 7-4 (1983); *Anders v. California*, 386 U. S. 738, 744 (1967). Separating the potentially meritorious wheat from the frivolous chaff is appellate counsel's job. See *Huguley v. State*, 324 S. E. 2d 729, 731 (Ga. 1985).

*Anders* too often prevents defense counsel from fulfilling this necessary role. As *amicus* will demonstrate, this decision places unreasonable ethical burdens on counsel, needlessly deterring them from acting as the gatekeeper against frivolous claims.

**II. *Anders* requires appointed counsel confronted with a frivolous appeal to write an "impossible brief," that overburdens the courts and treats other defendants unfairly.**

*A. The Improper Premise.*

*Anders v. California*, 386 U. S. 738 (1967) seems to operate from a premise of mistrust. The holding that a letter informing the court that the appeal is frivolous is ineffective advocacy, and must be supplemented by a brief allowing the court to examine the correctness of counsel's assertion, see *id.*, at 744, "can be explained, . . . only upon the cynical assumption that an appointed lawyer's professional representation to an appellate court in a 'no-merit' letter is not to be trusted." *Id.*, at 746 (Stewart, J., dissenting). This premise is the foundation for *Anders*' unworkable solution to the problem of frivolous appeals. It creates an impossible ethical dilemma for appointed counsel, creating unnecessary work and encouraging frivolous appeals.

Although the *Anders* majority does not state this assumption explicitly, the dissent's accusation is well-founded. Under the *Anders* procedure, the Court of Appeals duplicates counsel's role

of examining the entire record for issues to appeal. See *id.*, at 744. The Janus-faced *Anders* brief filed by counsel is often either perfunctory or a brief against the client. See R. Hermann, Frivolous Criminal Appeals, 47 N. Y. U. L. Rev. 701, 711-712 (1972). At best, the "brief referring to anything in the record that might arguably support the appeal," *Anders*, 386 U. S., at 744, requires counsel to point out potential flaws in his or her analysis to the court, which shows little confidence in appointed counsel's abilities.

*Anders* also betrays a low opinion of retained counsel. The decision is based on giving indigent and nonindigent defendants essentially equal access to the courts. See *id.*, at 745; *McCoy v. Court of Appeals of Wisconsin*, 486 U. S. 429, 438 (1988). Thus, "[i]n imposing this burden only upon attorneys representing 'penniless defendants' the court assumes, first, that anyone 'able to afford the retention of private counsel' has the right and opportunity to present any appeal, no matter how meritless it may be." Pengilly, Never Cry *Anders*: The Ethical Dilemma of Counsel Appointed to Pursue a Frivolous Criminal Appeal, 9 Crim. Just. J. 45, 49 (1986). From this follows *Anders*' belief that "private lawyers will undertake the appeal of any criminal conviction, even a frivolous one so long as they are compensated." Doherty, Wolf! Wolf!—The Ramifications of Frivolous Appeals, 59 J. Crim. L., Criminology & Police Sci. 1, 3 (1968). *Anders* thus defines the standard of practice for retained counsel at this lowest, most mercenary common denominator:

"Since, speaking realistically, a criminal defendant who has money will always be able to persuade some lawyer to prosecute an appeal for him, parity—or, again speaking realistically, an approximation to parity—between criminal defendants who do and those who do not have monetary means requires that the appointed counsel who wants to withdraw not leave his client wholly in the lurch, which is the practical consequence of the 'no merit' letter. Instead he must file a brief that will advise the court of what points he might have raised and why he thinks they would have been frivolous." *United States v. Edwards*, 777 F. 2d 364, 365 (CA7 1985) (*per curiam*).



This characterization of counsel that is the heart of *Anders* is corrosive and unfair. While some lawyers may file anything for money, *ethical* lawyers will not file a frivolous appeal regardless of the monetary consequences. See, e.g., ABA Model Rules of Professional Conduct, Rule 3.1 (1992); Doherty, *supra*, at 3. The overwhelming majority of lawyers do not abandon their profession responsibilities. See *United States v. MacCollom*, 426 U. S. 317, 326 (1976) (plurality).

Allowing constitutional standards to be defined by such unethical conduct is corrosive to the legal profession. Society and

"the legal profession has . . . been well served by a code of ethics which imposes certain standards beyond those prevailing in the market place and by a duty to place professional responsibility above pecuniary gain." *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, 677 (1985) (O'Connor, J., concurring and dissenting).

By virtue of its position at the apex of the federal judiciary, this Court is a leader of the legal profession. *Anders* is a poor use of this authority. Attorneys "occupy professional positions of responsibility and influence that impose on them duties correlative with their vital right of access to the courts." *In re Griffiths*, 413 U. S. 717, 729 (1973). They are "leaders in government throughout the history of our country." *Ibid.*

"Despite the almost continuous criticism leveled at the legal profession, he, too, is an influence in legislation, in the community, and in the role-model figure that the professional person enjoys." *Ambach v. Norwick*, 441 U. S. 68, 89 (1979) (Blackmun, J., dissenting).

This Court should both presume and expect a higher standard than found in *Anders*.

In *McCoy*, *supra*, this Court devised a more nuanced view of *Anders*, finding that private counsel might give an *Anders*-type brief to the client. See 486 U. S., at 439, n. 12. Although more benign than the original spirit of *Anders*, it still paints an inaccurate picture of counsel's role. *McCoy* repeats *Anders* original mistake, basing constitutional protections on what counsel *could* do as opposed to what an ethical attorney *should* do. The constitu-

tion does not mandate absolute equality, but rather freedom from unreasoned distinctions. See *Ross v. Moffitt*, 417 U. S. 600, 612 (1974). While retained counsel may give a client with a frivolous appeal an *Anders* brief, it is, at best, a rarity. A proper *Anders* brief can involve tremendous work. By one estimate it requires as much work as ten briefs on the merits. See Pengilly, *supra*, 9 Crim. Just. J., at 62-63. The paying client will rarely be as capable of appreciating it as the appellate judge under the *Anders* procedure. In almost any circumstance, giving an *Anders* brief to a paying client would be a waste of the client's money.

"Nor does the Constitution require that an indigent be furnished with every possible legal tool, no matter how speculative its value, and no matter how devoid of assistance it may be, merely because a person of unlimited means might choose to waste his resources in a quest of that kind." *MacCollom*, *supra*, 426 U. S., at 317 (Blackmun, J., concurring in the judgment).

Unfortunately, *Anders*' harm does not stop with the reputation of counsel. *Anders*' basic mistrust places burdens on counsel and courts that are the greatest cost of this decision.

#### B. The Impossible Dilemma.

*Anders*' central difficulty stems from the type of brief it requires counsel to write before withdrawing: "a brief referring to anything in the record that might arguably support an appeal." *Anders*, *supra*, 386 U. S., at 744. The problem with this seemingly innocuous requirement is that it is effectively impossible for an ethical attorney to write.

A brief is "[a] written statement prepared by counsel arguing a case in court. It contains a summary of the facts of the case, the pertinent laws and an argument of how the law applies to the facts *supporting counsel's position*." Black's Law Dictionary 192 (6th ed. 1990) (emphasis added). Black's definition nicely raises the first problem with the "*Anders*" brief: what is appointed counsel's position in the brief when he or she refers to items that "may arguably support an appeal"?

If counsel believes that the highlighted issues are not frivolous then the motion to withdraw is deceptive and thus unethical. See

ABA Model Rules of Professional Conduct, Rule 3.3 (1992) ("MRPC") (candor to tribunal). The only other realistic reading of an *Anders* brief is that counsel is asserting that these issues do not have merit, an interpretation supported by counsel's claim that the appeal is frivolous. Although *Anders* looks for issues "that might arguably support the appeal," the fact that counsel seeks to withdraw because there are no nonfrivolous issues cannot hide his or her opinion of the client's claims.

Identifying specific issues as insufficient to support an appeal typically is considered improper behavior of a professional charged to act as "an active advocate in behalf of his client as opposed to that of *amicus curiae*." *Anders*, *supra*, 386 U. S., at 744.

"A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." MRPC, Rule 1.3, comment (1) (emphasis added).

"[A] defense lawyer best serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing 'the undivided interests of his client.'" *Polk County v. Dodson*, 454 U. S. 312, 318-319 (1981) (quoting *Ferri v. Ackerman*, 444 U. S. 193, 204 (1979)).

*McCoy v. Court of Appeals of Wisconsin*, 486 U. S. 429 (1988) illustrates the type of representation *Anders* encourages. A Wisconsin rule required an *Anders* brief "also to include 'a discussion of why the issue lacks merit.'" *Id.*, at 430. Appointed counsel who sought to withdraw naturally refused to argue against his client. See *id.*, at 432, and n. 2. This Court upheld the rule under *Anders*. See *id.*, at 441-442. The *McCoy* Court was sympathetic to counsel's predicament.

"Appointed counsel, however, is presented with a dilemma because withdrawal is not possible without leave of court, and advising the court of counsel's opinion that the appeal is frivolous would appear to conflict with the advocate's duty to the client." *Id.*, at 437.

*McCoy* concluded that the *Anders* requirement that the court be informed of counsel's conclusion resolved the dilemma. See *ibid.*

Practitioners, commentators, and judges have found the *Anders* resolution wanting. As one former public defender noted:

"In short, *Anders* first requires counsel to make an impossible distinction between the 'meritless' and the 'wholly frivolous.' Having done so, counsel is then required to perform one or the other of two tasks, both of which are impossible and unethical: either argue the merits of claims which are meritless, or explain to the court why those claims are meritless without taking a position adverse to the client's interest." Pengilly, *supra*, 9 Crim. Just. J., at 52 (footnote omitted).

*Anders* places an ethical counsel confronted with a frivolous appeal between the Scylla of the duty not to present frivolous claims and the Charybdis of counsel's duty to act as an advocate on behalf of the client's interest.

"I think it is clear, however, that an attorney confronted with the *Anders* situation has to do something that the Code of Professional Responsibility describes as unethical; the only choice is as to which canon he or she prefers to violate." *Id.*, at 64.

Other practitioners share this experience. A New York Legal Aid attorney described how many counsel dealt with the dilemma:

"Some have written cursory and conclusory briefs which at least cannot be said to be advocacy against one's client, even though they are of little aid to the client or the court in reviewing arguable errors. Others have written briefs detailing at length both the facts and the legal issues and authorities. This, although most helpful to the court, usually is in effect a brief against the client." Hermann, *Frivolous Criminal Appeals*, 47 N. Y. U. L. Rev. 701, 711-712 (1972) (footnote omitted).

As the author noted, "[h]owever highminded may have been the Court's intentions [in *Anders*] . . . , in practice they cannot be fulfilled." *Id.*, at 711. A career public defender observed, "Any client is entitled to the very best that a lawyer has to offer; his skill, his knowledge, his experience, and his diligence. But no one



has the right to make an intellectual prostitute out of a lawyer." Doherty, Wolf? Wolf!—The Ramifications of Frivolous Appeals, 59 J. Crim. L., Criminology & Police Sci. 1, 3 (1968).

*Anders*' ethical dilemma has not escaped the attention of commentators. One commentator noted that while the procedure approved in *McCoy* "does reduce the risk that incompetent or lazy counsel will file a pro forma *Anders* brief, it intensifies the *Anders* anomaly when counsel is conscientious." 1 G. Hazard & W. Hodes, *The Law of Lawyering* §3.1:304, p. 568 (2d ed. 1996 Supp.). As another authority on professional responsibility pointed out, "While the court was well-meaning in developing the *Anders* procedure, it has proved to promote what amounts to an inherent conflict between the attorney and client . . ." J. Hall, *Professional Responsibility of the Criminal Lawyer* 681-682 (2d ed. 1996); see also C. Wolfram, *Modern Legal Ethics* 817 (1986) ("The *Anders* directives are confusing, if not contradictory.").

*Anders*' ethical problem has caused a reaction in some state courts.

"The major difficulty with the *Anders* procedure is its requirement that an attorney assume contradictory roles if he wishes to withdraw on the grounds that the appeal lacks merit. . . . This Janus-faced approach . . . runs the risk of alienating and frustrating his client, who can scarcely be blamed for feeling abandoned and betrayed . . ." *Commonwealth v. Moffett*, 418 N. E. 2d 585, 590 (Mass. 1981) (footnote omitted).

The sense of betrayal fostered by *Anders* will make for a very strained counsel-client relationship where the court refuses to grant the *Anders* motion. "In any case where counsel has unsuccessfully sought to withdraw on the basis that the appeal is frivolous and without merit he can find himself in a completely intolerable situation if required to thereafter pursue an appeal." *State v. McKenney*, 568 P. 2d 1213, 1214 (Idaho 1977) (*per curiam*).

The *Anders* Court wants appointed counsel to act like advocates as opposed to *amicus curiae* when attempting to withdraw from an appeal. See *Anders*, *supra*, 386 U. S., at 744. "This is a nonsequitor, however, for if it is assumed that the appeal

was in fact without merit, then no lawyer would have a license to press it forward, as *amicus* or otherwise." 1 Hazard & Hodes, *supra*, *The Law of Lawyering*, at 567. If anything, a conscientious *Anders* counsel acts more as *amicus* than advocate. The brief in *McCoy* that spelled out the weakness of the client's position is the nonpartisan advocacy one could expect from *amicus*. In any situation outside of *Anders*, however, such a brief from an advocate for a client would be malpractice and would subject counsel to discipline.

Just as this Court cannot use judicial fiat to avoid the economic realities, see Part I, *supra*, *Anders* cannot avoid its ethical problem. Fairness to the countless diligent and ethical appointed appellate counsel and their clients requires this Court to address the ethical dilemma posed by *Anders*.

### C. *The Impossible Distinction.*

*Anders*' problems do not end with its ethical dilemma. It also requires appointed counsel to split a hair too fine for even skilled, conscientious attorneys. The *Anders* Court, in its effort to protect indigent defendants from incompetent counsel, presumes that "frivolous" is capable of being defined much more precisely than reality allows.

*Anders* requires the brief accompanying the motion to withdraw to mention "anything in the record that might arguably support the appeal." 386 U. S., at 744. This cannot mean every conceivable issue; the universe of frivolous issues is vast and may be unlimited. This interpretation is supported by *Anders*' qualifying phrase "might arguably." These issues must thus come from a special subset of the set of all frivolous appeals; they are frivolous, but sufficiently less frivolous than other issues to warrant bringing to the attention of the Court. This is an unfair and impossibly impractical distinction.

"In effect, then, the Court must assume three categories of issues: (1) issues that are wholly frivolous and that do not have to be considered further by either counsel or court; (2) issues that are not substantial enough to warrant concluding that the appeal is anything but wholly frivolous but that nonetheless for, presumably, some other reason warrant discussion in an *Anders* brief accompany-



ing a motion to withdraw; and (3) issues that arguably support a nonfrivolous appeal and whose presence in the record triggers an obligation on the part of the appellate court to appoint new counsel to argue those points fully.

"Such hair-splitting among possible arguments hardly describes an operable test." Wolfram, *supra*, Modern Legal Ethics, at 817-818.

"Frivolous" cannot be defined with great precision. "Frivolousness, like madness and obscenity, is more readily recognized than cogently defined." Hermann, *supra*, Frivolous Criminal Appeals, 47 N. Y. U. L. Rev., at 705 (footnote omitted). This Court has never given any precise definition of "frivolous." *Anders* tosses around concepts such as "wholly frivolous," "arguably support the appeal," and "arguable on the merits" without giving any further definition to these open-ended terms. See *Anders*, 386 U. S., at 744. The closest this Court has come to fleshing out "frivolous" came in *McCoy v. Court of Appeals of Wisconsin*, 486 U. S. 426 (1988).

"The terms 'wholly frivolous' and 'without merit' are often used interchangeably in the *Anders*-brief context. Whatever term is used to describe the conclusion an attorney must reach as to the appeal before requesting to withdraw and the court must reach before granting the request, what is required is a determination that the appeal lacks any basis in law or fact." *Id.*, at 438-439, n. 10.

This is hardly encouraging to an appointed counsel attempting to split *Anders*' hairs. The reality is that every conclusion that an appeal is frivolous must be taken from the context of that particular case. "Thus the 'wholly frivolous' concept is not defined by abstract standards, but rather in terms of counsel's determination after a conscientious consideration of the record." *Nickols v. Gagnon*, 454 F. 2d 467, 471 (CA7 1971) (Stevens, J.). Without the guidance of bright-lines or clear definitions, counsel's task is unduly burdensome, if not impossible.

*Anders*' imprecision will also place undue burdens on the counsel who feels that there are not even any potentially arguable issues. Briefing an unquestionably frivolous issue would facially comply with *Anders* at the risk of concealing "a substantial

problem in a record . . ." *Id.*, at 472. Yet a brief containing no arguable issues runs a substantial risk of being labeled as not complying with *Anders*.

*Anders*' unguided distinction between the merely frivolous and the frivolous, but potentially arguable, reinforces the two-faced nature of this brief.

"As a practical matter, however, the brief required in order to withdraw will be nearly impossible to write. Counsel must explain why her client's appeal is frivolous, while simultaneously pointing to all errors in the record mandating reversal of her client's conviction." Pritchard, Auctioning Justice: Legal and Market Mechanisms for Allocating Criminal Appellate Counsel, 34 Am. Crim. L. Rev. 1161, 1166 (1997).

There is a further problem with *Anders*' requirement that counsel point out some potentially arguable issues.

"As the [*Anders*] dissenters rightly pointed out (and as frustrated appellate counsel have learned over the years) if there is an argument of that quality revealed in the record then the appeal is by definition not frivolous. *Anders* briefs therefore necessarily entail legal submissions that counsel regards as frivolous." 1 Hazard & Hodes, *supra*, The Law of Lawyering §3.1:304, at 567 (2d ed. 1996 Supp.).

Confronted with an impossible distinction, and the unpleasant task of satisfying the *Anders* "ceremony," see Wolfram, *supra*, at 817, many lawyers will simply refuse to file such briefs and instead file frivolous appeals. See Pritchard, *supra*, 34 Am. Crim. L. Rev., at 1166-1167; Hermann, *supra*, 47 N. Y. U. L. Rev., at 715-716. In this context, a decision to file a frivolous appeal is an unfortunately rational decision to avoid *Anders*.

#### D. The Unfair Burden.

*Anders*' distrust of appointed counsel leads it to transfer the responsibility of winnowing frivolous appeals from counsel to the appellate courts. Placing this decision in the hands of the courts

burdens already overburdened institutions, and unfairly advances the interests of the least deserving litigants.

Under *Anders*, before an appellate court may grant appointed counsel's motion to withdraw, it must "decide whether the case is wholly frivolous" only "after a full examination of all the proceedings." *Anders*, 386 U. S., at 744. Few duties, if any, can be less appealing to the intermediate appellate courts than searching the entire record to find the rare nonfrivolous needle in a haystack of frivolous claims. Cf. *Brown v. Allen*, 344 U. S. 443, 537 (1953) (Jackson, J., concurring). Just as the conscientious *Anders* brief can require the work of ten merit briefs, see Pengilly, *supra*, 9 Crim. Just. J., at 62-63, the detailed review of the entire record required by *Anders* places a disproportionate share of the court's scarce resources on presumptively frivolous appeals.

It is not the standard practice of the appellate courts to comb the record for all possible issues and raise unmentioned issues for argument on the merits. An issue defendant failed to raise on the first appeal in state court may be procedurally barred under federal habeas corpus. See *Murray v. Carrier*, 477 U. S. 478, 490-491 (1986). It is not typical for courts to address unraised errors in criminal appeals, and any attempt to do so would further burden them. See Warner, *supra*, 23 Fla. St. U. L. Rev., at 661.

This presents an equal protection problem that some consider to be the greatest difficulty posed by *Anders*. The detailed court review and the *sua sponte* raising of arguable issues gives *Anders* defendants greater privileges than either nonindigent defendants or the indigent defendants whose counsel submit a brief on the merits. See *id.*, at 641-642. As *Anders* is substantially based on treating the indigent fairly in comparison to the nonindigent defendant, see, e.g., *Anders*, *supra*, 386 U. S., at 457; *McCoy*, *supra*, 486 U. S., at 438, this failure of *Anders* is particularly disturbing. See Warner, *supra*, 23 Fla. St. U. L. Rev., at 662.

The injustice of this inequality is compounded by the uniquely undeserving recipients of *Anders*' largesse. *Anders* protects a class of litigants who are overwhelmingly validly convicted of crimes. Reversals after a court rejects an *Anders* motion occur "[e]xceedingly rarely . . ." Wolfram, *supra*, at 817, n. 35. Instead of minimizing resources on this undeserving many, *Anders* wastes judicial and attorney time on them at the expense of the

deserving few. Indeed, some state courts have found hearing frivolous appeals on the merits to be a more efficient use of their resources than utilizing the cumbersome *Anders* procedure. See, e.g., *State v. McKenney*, 568 P. 2d 1213, 1214 (Idaho 1977) (*per curiam*); *Commonwealth v. Moffett*, 418 N. E. 2d 585, 590-591 (Mass. 1981).

Under *Anders* the only party who does not bear the cost of frivolous appeals is the indigent defendant who wishes to press the frivolous claims. This creates an economic "tragedy of the commons" where the frivolous indigent defendants consume more resources than their cause warrants. See Pritchard, *supra*, 34 Am. Crim. L. Rev., at 1167-1168. Disposing of frivolous claims is important; unfortunately *Anders* transferred responsibility to the wrong actor. It is the attorney's role to act as gatekeeper against frivolous litigation; responsibility for identifying and disposing of such claims should be left to counsel, who are better equipped to fulfill this function than the courts. *Huguley v. State*, 324 S. E. 2d 729, 731 (Ga. 1985).

### III. *Anders* should be overruled or substantially modified.

When a decision is as heavily criticized and as harmful as *Anders v. California*, 386 U. S. 738 (1967) a discussion of its continued validity under the doctrine of *stare decisis* is necessary. Although *Anders* has had a substantial impact upon criminal procedure, and has existed relatively undisturbed for over 20 years, it should not be allowed to stand. The decision generates no reliance interest, it confuses the courts, and it causes considerable harm to society and the indigent defendants it is meant to protect. Any protections for indigent defendants with potentially frivolous claims deserve a sounder, less expensive foundation.

While *stare decisis* is an important doctrine serving a useful social policy, it does not have the same force as a statute or the Constitution. The judiciary's role in our society is as an interpreter of laws. See The Federalist No. 78, at 467 (A. Hamilton) (Rossiter ed. 1961). Therefore, *stare decisis*, while respected, cannot deter this or any other court from its ultimate duty of interpreting the law. *Stare decisis* is the law's servant, not its master.



This Court has recognized that the doctrine does not have the force of a rule of law and may be overridden when appropriate. "Whether it [*stare decisis*] shall be followed or departed from is a question entirely within the discretion of the court . . . ." *Hertz v. Woodman*, 218 U. S. 205, 212 (1910). While it will be followed in most cases, this is simply "a policy judgment that 'in most matters it is more important that the applicable rule of law be settled than that it be settled right.'" *Agostini v. Felton*, 521 U. S. 203, 235 (1997) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932) (Brandeis, J., dissenting)). Therefore, this Court has "treated *stare decisis* as a 'principle of policy,' *Helvering v. Hallock*, 309 U. S. 106, 119 (1940), and not as an 'inexorable command.'" *Seminole Tribe of Fla. v. Florida*, 517 U. S. 44, 63 (1996) (quoting *Payne v. Tennessee*, 501 U. S. 808, 828 (1991)).

Perhaps the most important factor in limiting *stare decisis* is the ability of other bodies to overturn this Court's decisions. This Court is particularly reluctant to overturn its own statutory interpretations, because Congress "remains free to alter what [this Court has] done." *Patterson v. McLean Credit Union*, 491 U. S. 164, 172-173 (1989).

Constitutional cases are another matter. Because " 'correction through legislative action is practically impossible,' " constitutional cases are more prone to re-examination than statutory cases, *Payne v. Tennessee*, *supra*, 501 U. S., at 828 (quoting *Burnet*, *supra*, 285 U. S., at 407 (Brandeis, J., dissenting)). Given the necessary tension between our democratic ideals and judicial review under the Constitution, see Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693, 695-696 (1976), this Court must be ready to reexamine its constitutional decisions in order to maintain the democratic nature of our society.

Refusing to reexamine an incorrect opinion that the public cannot overturn is corrosive to this Court's public respect. Thus the decision to uphold the incorrectly decided line of cases under *Lochner v. New York*, 198 U. S. 45 (1905) until 1937 helped to damage this Court as a public institution. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833, 861-862 (1992). "Of course, it is embarrassing to confess a blunder; it may

prove even more embarrassing to adhere to it." *United States v. Bryan*, 339 U. S. 323, 346 (1950) (Jackson, J., concurring).

This Court is also more willing to reexamine decisions that have developed contradictions over time. Thus, this Court will not allow *stare decisis* to preserve inconsistent or difficult to administer decisions. See *Patterson*, *supra*, 491 U. S., at 173. Similarly, if the conditions that motivated a decision change, then there is good reason to overrule the prior decision. See *Casey*, 505 U. S., at 855, 862.

The fact that *stare decisis* is not a " 'mechanical rule' " is demonstrated by the hierarchy within the doctrine. While some decisions are virtually etched in stone, others warrant more flexibility. For those cases less worthy of *stare decisis*, " 'the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.' " *United States v. Scott*, 437 U. S. 82, 101 (1978) (quoting *Burnet*, *supra*, 285 U. S., at 408 (Brandeis, J., dissenting)).

The most important consideration when examining the *stare decisis* value of a decision is the public's reliance interest in that precedent. *Stare decisis* benefits society and legal institutions "because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of judicial process." *Payne*, *supra*, 501 U. S., at 827. Where these interests are greater, *stare decisis* considerations are correspondingly more important. Thus, "*stare decisis* concerns are at their acme in cases involving property and contract rights." *State Oil Co. v. Kahn*, 522 U. S. 3, 20 (1997); *Payne*, *supra*, 501 U. S., at 828.

There is no reliance interest in *Anders*. Reliance is at its weakest in cases involving "procedural and evidentiary rules." *Payne*, *supra*, 501 U. S., at 828. *Anders'* particular lack of reliance interest can be seen by examining the analogous field of retroactive application of statutes.

The retroactive application of statutes is generally disfavored. See *Landgraf v. USI Film Products*, 511 U. S. 244, 268 (1994). However, when the statutory change effects a rule of procedure, then the change generally may be applied to a pending case



because "they regulate secondary rather than primary conduct." *Id.*, at 275. "Primary conduct" is the conduct of people in their ordinary course of life. In *Landgraf*, this was "the discriminatory conduct of respondent's agent . . ." *Id.*, at 283. In the present case, this would be Robbins' car theft and the killing of his former roommate.

The "secondary conduct" is the adjudication, in this case the defendant's trial. Decisions regarding trial procedures, such as evidence to be heard at sentencing, thus do not invoke the reliance interest warranting *stare decisis* protection. See *Payne*, *supra*, 501 U. S., at 828. The *Anders* procedure is even further removed from defendant's conduct. It is a "prophylactic framework," see *Pennsylvania v. Finley*, 481 U. S. 551, 555 (1987), that regulates appellate procedure, which is so far removed from defendant's initial conduct it could be deemed "tertiary conduct." No one regulates their affairs in reliance on *Anders*' rule of appellate procedure.

Another important consideration in deciding whether to uphold a decision is how well the precedent guides those who must apply it. A precedent that proves to be confusing and difficult to apply deserves much less *stare decisis* protection. See *United States v. Dixon*, 509 U. S. 688, 712 (1993). "[W]hen governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" *Payne*, *supra*, 501 U. S., at 827 (quoting *Smith v. Allwright*, 321 U. S. 649, 665 (1944)).

*Anders*' intrinsic ethical conflict and the considerable difficulty with finding possibly arguable, but still frivolous issues, makes a brief comporting with the literal rule and spirit of *Anders* practically impossible to write for conscientious, ethical attorney. See *supra*, at 13-19; see Pengilly, *Never Cry Anders: The Ethical Dilemma of Counsel Appointed to Pursue a Frivolous Appeal*, 9 *Crim. Just. J.* 45, 52 (1986); Pritchard, *Auctioning Justice: Legal and Market Mechanisms for Allocating Criminal Counsel*, 34 *Am. Crim. L. Rev.* 1161, 1166 (1997). *Anders* left key terms such as "wholly frivolous" and "arguably support the appeal" undefined, a failing this Court has never remedied. See *supra*, at 18. It is unfortunately too easy to sympathize with the complaint of one attorney that "[a]fter reading [*Anders*] carefully, however, I

still had no idea what was expected of me or any other appointed attorney in a similar position." Pengilly, *supra*, 9 *Crim. Just. J.*, at 47. As one treatise somewhat undiplomatically put it: "such a document, known as an *Anders* brief, is an anomaly, and demonstrates the Court's isolation from the realities of practice." 1 G. Hazard & W. Hodes, *The Law of Lawyering* §3:1:304, p. 567 (2d ed. 1996 Supp.)

*Anders* is no easier on the courts that must administer it. A Florida appellate judge, in her survey of the courts implementation of *Anders*, noted that dealing with *Anders* is "[a] continuing source of frustration for the appellate judge . . ." Warner, *Anders in the Fifty States: Some Appellants' Equal Protection is More Equal than Others*, 23 *Fla. St. U. L. Rev.* 625, 625 (1996). *Anders*' lack of clarity is reflected in the many different approaches courts take to implementing the decision.

"Ten states have rejected the *Anders* procedure." *Id.*, at 642. The judicial abandonments of *Anders* have invoked various reasons and applied different means to avoid this decision. The Idaho Supreme Court simply refused to allow counsel to withdraw from frivolous appeals, finding that such appeals can be disposed of more fairly and efficiently through the traditional briefing process than under *Anders*. See *State v. McKenney*, 568 P. 2d 1213, 1214 (1977) (*per curiam*). The North Dakota Supreme Court found *Anders* violated state constitutional law depriving defendant of his state right to appeal. See *State v. Lewis*, 291 N. W. 2d 735, 738 (1980). Its solution was to appoint new counsel whenever original counsel claimed the appeal was frivolous. *Ibid.* Even though this might force some counsel to file briefs that they believed frivolous, this consequence was acceptable due to the substantial court time saved by abandoning *Anders*. See *ibid.* Unfortunately, the Court also concluded that it would still impose sanctions for prosecuting a frivolous appeal. *Id.*, at 738-739.

The Massachusetts Supreme Court effectively abandoned *Anders* in *Commonwealth v. Moffett*, 418 N. E. 2d 585 (1981). The Court's decision was based on both the "Janus-faced approach" of *Anders* briefs, and the administrative problems of dealing with *Anders*. See *id.*, at 590. If counsel finds it "absolutely necessary" to be disassociated from frivolous arguments in

the brief, the court allowed counsel to indicate this in a preface to the brief, while requiring this brief to be served on the client. *Id.*, at 591-592.

Perhaps the most thorough examination of *Anders* came from another court that withdrew from the decision, the Oregon Supreme Court. In *State v. Balfour*, 814 P. 2d 1069 (1991), the Oregon high court reasoned that after *Penson v. Ohio*, 488 U. S. 75 (1988), *Anders* was not a mere set of guidelines, but instead "a stringent benchmark against which to gauge state procedures." *Balfour*, 814 P. 2d, at 1076. The *Balfour* Court nonetheless reaffirmed its preeminence as the arbiter of legal ethics within the state except when such practices implicated federal constitutional rights. *Id.*, at 1078. Therefore, it rejected *Anders* as the only permissible solution to the problem of frivolous appeals by indigent defendants. *Ibid.* By preventing counsel from withdrawing, the constitutional mandate for *Anders* was gone; *Anders* only applied to motions to withdraw. *Id.*, at 1079. This allowed counsel to avoid the unethical requirement of having to argue frivolous issues. Counsel would simply file a statement of the facts and jurisdiction of the court. *Id.*, at 1080. If the defendant desired to raise issues, counsel would assist in preparing them, but would not have to sign that part of the brief, avoiding any ethical problem with advancing frivolous issues. *Ibid.* This convoluted brief would thus resolve *Anders*' conflict between advocacy and the prohibition against frivolous appeals. See *id.*, at 1081.

Georgia, Mississippi, and New Hampshire have also abandoned *Anders* in decisions. See *Huguley v. State*, 324 S. E. 2d 729, 731 (Ga. 1985); *Killingsworth v. State*, 490 So. 2d 849, 851 (Miss. 1986) (en banc); *State v. Cigic*, 639 A. 2d 251, 254 (N.H. 1994). Other courts have abandoned *Anders* informally. These states include: Hawaii, Kansas, Maryland, New Jersey, Alaska, and Nebraska. See *Warner, supra*, 23 Fla. St. U. L. Rev., at 651.

There is little consistency among the jurisdictions that attempt to apply *Anders*. California's interpretation, *People v. Wende*, 25 Cal. 3d 436, 600 P. 2d 1071 (1979), is perhaps the closest to literal compliance with *Anders*. See *Pengilly, supra*, 9 Crim. Just. J., at 57-58. The California Supreme Court noted that under this procedure, counsel could obtain greater review for the client than when counsel raised specific issues in a brief on the merits. See

*Wende*, 25 Cal. 3d, at 1078, 600 P. 2d, at 1075. The Court felt confident that attorneys would not shirk their professional responsibility by filing false *Anders* briefs, *ibid.*, showing more respect for the profession than the *Anders* majority.

Following this Court's example in *Anders*, the California Supreme Court provides little detail as to what the withdrawal brief should contain, other than "a statement of the facts and the applicable law . . ." See *People v. Feggans*, 67 Cal. 2d 444, 447, 432 P. 2d 21, 23 (1967); *Wende, supra*, 25 Cal. 3d, at 440, 600 P. 2d, at 1073. Other states, however, are more willing to inform counsel what the brief should obtain. Arkansas provides particularly detailed guidance, requiring that the brief:

"shall contain an argument section that consists of a list of all rulings adverse to the defendant made by the trial court on all objections, motions and requests made by either party with an explanation as to why each adverse ruling is not a meritorious ground for reversal. The abstract section of the brief shall contain, in addition to the other material parts of the record, all rulings adverse to the defendant made by the trial court." Rules of Arkansas Supreme Court and Court of Appeals, Rule 4-3(j)(1).

This level of detail is not required of briefs on the merits, and probably deters the filing of *Anders* briefs. See *Warner, supra*, 23 Fla. St. U. L. Rev., at 653, n. 223. A somewhat less detailed, but still explicit regulation was upheld by this Court in *McCoy v. Court of Appeals of Wisconsin*, 486 U. S. 429, 430 (1988). Other states are much less focused, allowing *Anders* to be governed by local rules of court, see *Warner, supra*, 23 Fla. St. U. L. Rev., at 654, n. 225.

One consequence of the confusion surrounding *Anders* is a considerable variation in how courts review *Anders* motions. The Warner survey of *Anders* found that:

"Fourteen courts, or twenty-one percent of those responding, indicated that they do not comb the record to point out arguable appellate issues. Others reported that they point out only issues constituting clear error, not merely issues of arguable merit. When unaddressed issues are found, the majority of courts simply order rebriefing by



appointed counsel. However, a substantial number of courts order the appointment of new counsel to file new briefs on this occasion. And, in what appears to be a practice contrary to the holding of *Penson v. Ohio*, some courts address the issues sua sponte without any rebriefing. When issues of arguable merit are found by the court in its review, whether to appoint new counsel or to allow rebriefing by withdrawing counsel also varies among the districts within some states." *Id.*, at 656.

*Anders* is a mess. The socially useful experimentation of federalism is one thing; the widespread repudiation and inconsistent application of *Anders*' vague and inconsistent mandates is another. Something must be done about *Anders*, and *stare decisis* should not stand in the way.

Ideally, *Anders* should simply be overruled. It wastes scarce judicial resources on behalf of the least deserving litigants at the expense of indigent defendants with valid claims. It is premised upon a degrading appraisal of the appointed bar and a cynical appraisal of retained counsel. By virtue of its unsolvable ethical dilemma and logically untenable distinctions, *Anders* requires a brief from counsel that is as impossible to write as it is degrading. All of these problems limit judicial efforts to free up its scarcest resources, the appellate courts.

Overruling *Anders* will not leave indigent defendants without recourse if appointed counsel improperly withdraws. A claim for ineffective assistance of appellate counsel would still be available to appellants who are actually prejudiced. See *Evitts v. Lucey*, 469 U. S. 387, 397-398 (1985). "The ability to raise ineffective assistance claims based in whole or in part on counsel's procedural defaults substantially undercuts any predictions of unremediated manifest injustice." *Murray v. Carrier*, 477 U. S. 478, 496 (1986). While such relief may not be easy to obtain, appeals believed frivolous very rarely contain reversible issues. See *supra*, at 21. Allowing counsel to act as gatekeeper would free resources to allow other defendants with briefable issues to receive justice.

Overruling *Anders* does not abandon the indigent defendant whose counsel seeks to withdraw. Some procedure should guide the court's discretion to allow counsel to withdraw, but it should

be less cumbersome, divisive, and suspicious than *Anders*. Counsel should not be required to submit the impossible *Anders* brief, but may instead write a letter like the one accepted by the California Court of Appeal in *Anders*. The letter should state that there is no merit to the appeal, that counsel came to this conclusion after studying the record, and that counsel informed defendant of this conclusion. See *Anders v. California*, 386 U. S. 738, 739-740 (1960). Defendant should receive a copy of this letter, and should have the option of filing a *pro se* brief, or making a request to the court to find substitute counsel. The request may include any potentially appealable issues defendant wishes to bring to the court's attention. The court may, but does not have to, grant defendant's request for new counsel. Courts would be free to develop more stringent policies, or even to forbid counsel from withdrawing from frivolous appeals.

This procedure would be efficient, by avoiding *Anders*' wasteful duplication of resources. It would also be easier for counsel than writing the impossible *Anders* brief, while still protecting defendant. Although the protection is less than that found in *Anders*, the interests *Anders* purports to protect deserve less effort than that decision requires. Attorneys can be trusted to act professionally when withdrawing from cases. An erroneous withdrawal that results in the undeserved affirmance of a conviction is exceedingly rare. See *supra*, at 21. The harm to society and defendants from *Anders*' wasteful procedure is greater and more certain. In the end, everyone benefits by abandoning *Anders*, for a more trusting, less cumbersome procedure.

If this Court refuses to overrule or modify *Anders*, it should nonetheless "decline to go beyond it, by even a fraction of an inch." *Silverman v. United States*, 365 U. S. 505, 512 (1961). The Ninth Circuit's decision to void California's *Wende* procedure is such an improper extension of *Anders*. A wrong rule is necessarily a "new rule," not dictated by precedent. Cf. *Conn v. Gabbert*, 526 U. S. \_\_\_\_ (No. 97-1802, April 5, 1999) (slip op., at 7) (holding the nonexistence of a right "pretermitt[s] the question of whether such a right was 'clearly established' as of a given day"). The Ninth Circuit's decision was thus at least barred under *Teague v. Lane*, 489 U. S. 288 (1989).



"Justice, like other goods, is scarce." Pritchard, *supra*, 34 Am. Crim. L. Rev., at 1191. *Anders* has created an unworkable standard in pursuit of an unnecessary goal, "squandering judicial resources with little offsetting benefit to anyone." *Sandin v. Conner*, 515 U. S. 472, 482 (1995). This Court should trust courts and counsel to find the best way of maximizing justice with their necessarily limited resources.

### CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

April, 1999

Respectfully submitted,

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No. 92-1637

JUN 21 1993

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In the Supreme Court  
OF THE  
United States

OCTOBER TERM, 1992

GEORGE SANTI, Warden,  
*Petitioner,*

vs.

LEE ROBBINS,  
*Respondent.*

On Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF  
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"Panel attorney": Refers to a private attorney accepted onto a panel of attorneys which is maintained by an appellate project for court appointments in indigent appeals.

"Project attorney," "Staff attorney": Refers to an attorney who works on the staff of an appellate project.

## STATUTES, RULES, AND STANDARDS

California Penal Code Section 1237.5 (as of January 1, 1999):

**§ 1237.5. Appeal by defendant from judgment of conviction upon plea of guilty or nolo contendere or revocation of probation; certificate of probable cause; operative date**

No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met:

(a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings.

(b) The trial court has executed and filed a certificate of probable cause for such appeal with the county clerk.

This section shall become operative on January 1, 1992.

California Rule of Court 76.5 (as of January 15, 1999):

**Rule 76.5. Appointment of counsel in criminal appeals**

(a) [Procedures] Each appellate court shall adopt procedures for appointment of counsel in criminal cases for indigent appellants who are not represented by the State Public Defender. The procedures shall require each attorney to complete a questionnaire showing the date of admission to the bar and the attorney's qualifications and experience.

(b) [Lists of qualified attorneys] On receiving each completed questionnaire, the court shall evaluate the attorney's



qualifications to represent appellants in criminal cases, and then place the attorney's name on one or more lists to receive appointments to cases for which he or she is qualified. Each Court of Appeal shall maintain at least two lists, to match the attorney's qualifications to the demands of the case. In establishing the lists, the court shall consider the guidelines in section 20 of the Standards of Judicial Administration, except as provided in subdivision (d).

(c) [Evaluation] The court shall review and evaluate the performance of appointed counsel to determine whether counsel's name should remain on the same appointment list, be placed on a different list, or be deleted.

(d) [Contracts for performance of administrative functions] The court may contract with an administrator having substantial experience in handling criminal appeals to perform the functions specified in this rule. The guidelines in section 20 of the Standards of Judicial Administration need not be applied if the contract provides for a qualified attorney to consult with and assist appointed counsel concerning the issues on appeal and appellant's opening brief. The court shall provide the administrator with information needed for the performance of the administrator's duties, and, if the administrator is to perform the review and evaluation functions specified in subdivision (c), the court shall notify the administrator of superior or substandard performance by appointed counsel.

Standards of Judicial Administration Recommended by the Judicial Council, § 20 (as of January 15, 1999):

**§ 20. Guidelines for appointment of counsel in criminal appeals**

(a) [General] Each appellate court, when establishing and maintaining lists of qualified counsel for appointment in criminal appeals as required by rule 76.5, should follow the guidelines in this section to match each appointed attorney's skills and experience with the demands of the case.

Before appointment of counsel in a case, the court should determine the demands of the case by reviewing the trial court file or by other appropriate means. In determining the demands of the case, the following factors should be considered: the length of the sentence; the novelty or complexity of the issues; the length of the trial and of the reporter's transcript; and any questions relating to the competency of trial counsel.

(b) [Courts of Appeal] Each Court of Appeal should maintain three lists of qualified attorneys. The lists should be based on the following minimum qualifications:

List I (For appointment to cases in which probation was granted, or the sentence is five years or less in state prison): (1) active membership in the State Bar; (2) attendance at one approved appellate training program; (3) participation in one trial or appellate brief; and (4) submission of one sample of the attorney's writing for review by the court or administrator.

List II (For appointment to cases in which the sentence is five years to fifteen years in state prison): (1) active practice of law for 18 months in the California state courts or equivalent experience; (2) attendance at two approved appellate training programs; (3) completion of two appellate cases; and (4)

submission of two appellant's opening briefs written by the attorney, for review by the court or administrator.

List III (For appointment to cases in which the sentence is fifteen years to life in state prison): (1) active practice of law for three years in the California state courts or equivalent experience; (2) attendance at two approved appellate training programs; (3) completion of five appellate cases; and (4) submission of two appellant's opening briefs written by the attorney, for review by the court or administrator.

(c) [Supreme Court] The Supreme Court should maintain a list of attorneys for appointment in death penalty cases, based on the following minimum qualifications: (1) active practice of law for four years in the California state courts or equivalent experience; (2) attendance at three approved appellate training programs, including one program concerning the death penalty; (3) completion of seven appellate cases, one of which involves a homicide; and (4) submission of two appellant's opening briefs written by the attorney, one of which involves a homicide, for review by the court or administrator.

## INTEREST OF AMICUS CURIAE<sup>1</sup>

Jesus Garcia Delgado was the indigent defendant and appellee in *Delgado v. Lewis*, 168 F.3d 1148 (No. 97-56162, 9th Cir. 1999) (petn. for reh. pending), in which the U.S. Ninth Circuit Court of Appeals affirmed the conditional grant of habeas corpus by the U.S. District Court for the Central District of California, based on appointed counsel's failure to file a brief that met the requirements of *Anders v. California*, 386 U.S. 738 (1967) and *Penson v. Ohio*, 488 U.S. 75 (1988). The Ninth Circuit's *Delgado* opinion adhered to its opinion in *Robbins v. Smith*, 152 F.3d 1062 (9th Cir. 1997), which is now the case at bar after this Court's grant of certiorari. The Warden's brief in the case at bar refers to the Ninth Circuit's *Delgado* opinion. WB 14, 30, 34.

This case potentially has a direct effect on Mr. Delgado's case, as the primary issues in this case are also the issues on which Mr. Delgado prevailed in the Ninth Circuit. Mr. Delgado's efforts to obtain one appeal of right with the constitutional guarantee of advocacy of counsel have gone on for over 4 years, but thus far have not been successful. An adverse decision in this case could impair or eliminate Mr. Delgado's ability to obtain a single appeal with advocacy of counsel. For all of these reasons, Mr. Delgado has a strong interest in the outcome of this case.

## SUMMARY OF ARGUMENT

Most of the Warden's brief, and the entire *amicus curiae* brief of the California Academy of Appellate Lawyers (CAAL), is premised on factual assertions regarding California indigent appeals which are stated for the first time in this Court, not supported by citation, and not based on anything in any record. *Amicus curiae*

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<sup>1</sup> Under Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or part, and no person or entity made a monetary contribution to its preparation or submission. Under Rule 37.3, *amicus curiae* states that all parties have given written consent to this brief being filed.



disagrees that a case should be litigated in this Court in that manner. But if those assertions are considered, *amicus curiae* is compelled to point out that they are significantly erroneous. The majority of California's appellate projects and appellate courts, including its Supreme Court, follow *Anders* in criminal appeals. There is no single "California appellate project system," and each appellate project handles no-merit briefs as it sees fit. It is also inaccurate to say that two qualified attorneys completely and comprehensively review the record in every no-merit appeal.

This Court's opinion in *Douglas v. California*, 372 U.S. 353 (1963), and *Anders, Penson, and McCoy v. Court of Appeals*, 486 U.S. 429 (1988) which followed it, required that indigent criminal appellants be given legal advocacy in one appeal of right when a state grants appeals to people of means. An *Anders* brief is advocacy. The no-merit no-advocacy form brief urged by the Warden and CAAL is not, so it fails constitutional requirements. The Warden's effort to distinguish *Penson*, on the ground that counsel there moved to withdraw while counsel in the case at bar didn't, is unavailing, as a non-withdrawing attorney who files a no-merit no-advocacy form brief still provides no advocacy.

Moreover, as *Anders* and *Penson* held, the court must determine whether an appeal lacks arguable issues. That cannot be delegated to counsel; the court is responsible for protecting the integrity of the judicial process, and safeguarding the right to counsel. A court cannot determine whether an appeal lacks legal issues, or anything else in our adversarial system, without advocacy. A "no-advocacy appeal" is no more permissible than a "no-advocacy trial."

While the Warden and CAAL argue that review by two attorneys can vitiate the above constitutional requirements, this Court rejected the same argument in *Anders*, and previously in *Ellis v. United States*, 356 U.S. 674 (1958) (per curiam). The Warden's effort to create a prejudice rule for denial of advocacy of counsel was also previously rejected by this Court in *Penson*.

## ARGUMENT

*Amicus curiae* Jesus Garcia Delgado was totally denied any advocacy of counsel at his sentencing: His attorney was a no-show, and a "stand-in attorney"—who had a major conflict—merely submitted the matter. Mr. Delgado then was totally denied any advocacy of counsel in his appeal: His attorney missed strong and obvious issues and failed to obtain a proper record, instead filing a no-merit, no-advocacy form brief of the type praised by the Warden and CAAL. The result is that in more than four years, no court has considered any argument by an attorney for Mr. Delgado on the merits of his appeal, and that situation has no end in sight.

Mr. Delgado's "journey in the criminal justice system," *Delgado v. Lewis*, 168 F.3d at 1154, shows the wisdom of this Court's *Anders* opinion and its *Penson* opinion reiterating *Anders*, which implemented the guarantee of counsel in *Douglas v. California*, 372 U.S. 353. Mr. Delgado was entitled to one appeal with advocacy of counsel, and would have had one if his attorney had followed *Anders* and *Penson*. But it didn't happen.

In Mr. Delgado's case, like respondent Robbins', the Ninth Circuit relied on *Anders*, *Penson* and *Douglas* in holding that the no-merit, no-advocacy form brief urged by the Warden and CAAL doesn't meet minimum standards of advocacy. *Delgado v. Lewis*, 168 F.3d 1148. The Warden deems this "cynicism in full flower." WB 34. Respectfully, *amicus curiae* believes this Court's precedent in *Anders*, *Penson* and *Douglas* is the law, not "cynicism."

### I. Background Of *Amicus Curiae's* Case

Some of *amicus curiae's* points are best made with reference to the facts of his own case. Those facts are well stated in Judge Thomas's opinion for the Ninth Circuit, *Delgado v. Lewis*, 168 F.3d at 1149-51, to which this Court may refer. In case it is of assistance, *amicus curiae* briefly recounts the facts which appear most pertinent here. (References generally are to the Ninth Circuit



excerpts of record ["DER"]; other references are to documents filed in the California state proceedings.)

As part of a six-defendant information, Mr. Delgado was charged with manufacture of methamphetamine and related offenses. DER 26, 188. After a motion to suppress evidence and other pretrial motions were heard and denied, *see* DER 97, 99, the six defendants all entered into plea agreements. DER 133-39. In return, the trial court agreed to impose sentences with specified maximums, and to consider any materials and argument presented in support of sentencing below the maximum. DER 128-32.

For sentencing, counsel for five of the six defendants presented documents and arguments for mitigation in briefs, at the sentencing hearing, or both. DER 147-50, 161-69, 171-74, 177-78, 181-85. Three of those five defendants received sentences well under the trial court's stated maximum. DER 175, 179, 181-86.

Alone among the six defendants, Mr. Delgado had no presentation in mitigation made on his behalf. No sentencing brief or other documents were filed, and no witnesses or argument were presented at sentencing. DER 157-59. In fact, Mr. Delgado's appointed trial counsel was a total no-show at the sentencing hearing. DER 140, 143, 357. He also had been a no-show at Mr. Delgado's preliminary hearing, and had relied on a co-defendant's attorney to explain the guilty plea form to Mr. Delgado. DER 357.

At sentencing, one of the co-defendant's attorneys purported to act as Mr. Delgado's "stand-in counsel." DER 143. This attorney had a major conflict, because she had obtained a court commitment of probation for her own client over the prosecutor's strong objection. DER 181-85, 357-58. When asked through an interpreter if "stand-in counsel" was OK, Mr. Delgado, who understood little English and had a grade school education in rural Mexico, said yes. DER 143, 188, 295. No effort was made to explain to Mr. Delgado that he had a right to his own attorney, or that he could continue the hearing for that purpose, or the existence

or nature of "stand-in counsel's" conflict. DER 143. "Stand-in counsel" merely submitted on Mr. Delgado's sentencing, before securing her own client's grant of probation. DER 158, 182, 185.

With no argument in mitigation on his behalf, Mr. Delgado received the maximum sentence permitted by the plea agreement, 15 years. DER 159.<sup>2</sup>

Subsequently, Mr. Delgado's appointed trial attorney obtained a certificate of probable cause, DER 113, California's procedural requirement for permission to appeal most types of issues after a guilty plea. Cal. Pen. Code § 1237.5. A notice of appeal was filed with the certificate. DER 112. Another attorney was appointed for the appeal, on an "independent" basis. DER 201.

Mr. Delgado's appellate attorney received a record that was missing the suppression motions and transcripts, some of the other preplea proceedings, and other relevant documents. *See* Application to Augment the Record on Appeal [post-grant of habeas], Cal. Ct. App. No. E016476, Oct. 14, 1997, at 2-9. The attorney did not request to augment the record to include these materials. *See ibid.* The attorney told Mr. Delgado his appeal was "simply worthless," and that he saw no issues. DER 256.

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<sup>2</sup> Despite the total absence of advocacy at sentencing, even this undeveloped record contains facts that would have given an advocate ample basis for argument in mitigation. Importantly, as the Ninth Circuit pointed out, Mr. Delgado, then 45, had no known criminal record. 168 F.3d at 1149-50; *see also* DER 231, 251. Beyond that, Mr. Delgado told the probation officer he and his wife were originally hired to do menial labor at the ranch where the meth lab was later set up, *i.e.*, maintenance and taking care of the animals. DER 194. Mr. Delgado fully admitted participation in the manufacturing operation, albeit a subsidiary role—he washed buckets of chemicals, and dumped buckets of methamphetamine liquid into strainer containers, doing what he was told (a role befitting someone who apparently shoveled animal manure). DER 193-94. Delgado's admission of responsibility, however, impressed the judge and persuaded him Delgado was telling the truth, at least to a substantial extent and more than any other defendant. DER 163-64.

The attorney then filed a no-merit brief, DER 201-13, with a short statement of procedural history and prosecution evidence from the preliminary hearing, which failed to set forth any legal points, issues or authority, or "anything [else] in the record that might arguable support the appeal." *Penson*, 488 U.S. at 80; *Anders*, 386 U.S. at 744. The no-merit brief requested that the court review the record, and included a declaration saying the attorney had read the record; gave Mr. Delgado an evaluation of the appeal; and was not moving to withdraw. DER 201-13. With the help of a "jailhouse lawyer," Mr. Delgado filed a *pro. per.* supplemental brief. DER 214-24. The Court of Appeal opinion recited a short procedural history, then concluded: "We have now concluded our independent review of the record and find no arguable issues. The judgment is affirmed." DER 226-28.

Now *pro. per.* and in prison, and without any transcripts (since his attorney hadn't sent them, *see* DER 358-59), Mr. Delgado filed a handwritten petition for review in the California Supreme Court. DER 230-31. It was denied without opinion. DER 235. Then, with the help of a "jailhouse lawyer," Mr. Delgado filed a petition for habeas corpus in the California Supreme Court. DER 236. That was also denied without opinion. DER 257.

Again aided by a "jailhouse lawyer," Mr. Delgado filed a petition for habeas corpus with the U.S. District Court for the Central District of California. DER 258. The District Court granted the writ conditionally, subject to the State accepting jurisdiction over Mr. Delgado's appeal and appointing new counsel. DER 367.

On September 2, 1997, the California Court of Appeal reinstated Mr. Delgado's appeal and appointed new counsel (the undersigned). Supp. DER 21. However, it later stayed the appeal in mid-briefing, over objection; that stay has continued for over a year. 2d Supp. DER 67-68, 75-93. On February 22, 1999, the Ninth Circuit affirmed the District Court's conditional grant of habeas corpus. *Delgado v. Lewis*, 168 F.3d 1148 (9th Cir. 1999). The State's petition for rehearing is pending as of this writing.

## II. The Warden's And CAAL's Unsupported Factual Assertions On California Indigent Appeals

The Warden as petitioner and CAAL as *amicus curiae* have made arguments that fundamentally depend on their view of what they call (i) California's "procedure" for handling no-merit appeals, and (ii) California's "system" for appointing counsel in noncapital indigent criminal appeals. The Warden derives his factual assertions on these matters from CAAL *amicus curiae* brief, *see* WB 21, which in turn repeats essentially CAAL's assertions in its *amicus curiae* submission in support of the petition for certiorari.

It appears that none of the "facts" asserted by the Warden and CAAL with respect to their theories of a California "system" or "procedure" is in the record before this Court. Certainly, these "facts" were not asserted and were not the subject of any evidence in the Ninth Circuit, the District Court, or the state courts. It seems unusual that a party should be advancing legal arguments for the first time in this Court through unsworn factual arguments of counsel, which are supported by no citation to authority. *See, e.g., Chapman & Dewey Lumber Co. v. Board of Directors of St. Francis Levee District*, 234 U.S. 667, 668 (1914).

*Amicus curiae* does not believe that arguing "facts" not in the record, and not supported by citation, is an appropriate way to litigate legal issues before this Court. However, the Warden and CAAL have put their unsupported assertions before this Court as a major premise of their arguments. *Amicus curiae* does not believe he can allow significantly erroneous assertions to stand unrebutted.<sup>3</sup>

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<sup>3</sup> Counsel for *amicus curiae* is familiar with the area, as he has done indigent appeals in California for the past seven years, and works closely on an ongoing basis with appellate projects and their attorneys. He has been on the panel of each of the five projects at various times in those seven years. He is a certified appellate law specialist, certified by the State Bar of California, Board of Legal Specialization.



*Amicus curiae* must therefore, reluctantly, provide a more balanced perspective on those assertions. To do so, *amicus curiae* cites written documentation where possible, but for some points he has had to rely on unwritten discussions. Since "factual" assertions on California indigent appeals are not properly before the Court, *amicus curiae* would prefer it if this Court disregarded everyone's unsupported assertions on these topics—CAAL's, *passim*; the Warden's, WB 8-9, 20-21, 23, 34; and *amicus curiae*'s own, *infra*, pp. 8-15. But since *amicus curiae* cannot be sure this Court will agree with his view of what should be considered, he believes he is compelled to discuss the Warden's and CAAL's assertions.

#### A. Overview

The Warden's and CAAL's briefs create the impression that there is a single California "appellate project system"—also dubbed a "California procedure"—which rejects *Anders*. WB 7-9, 12-13, 18-21, 23-24, 28, 32, 45-48, 50; CAAL 2-3, 5-6, 9-10, 12-14. They contend that this so-called "California system" replaces *Anders* with a form no-merit brief that contains no legal authority, no issues and no advocacy, and that the California Supreme Court specified this approach in *People v. Wende*, 25 Cal.3d 436, 158 Cal.Rptr. 839, 600 P.2d 1071 (1979). WB 3-4, 7-10, 13, 18-20, 22, 24, 29, 32, 34, 43, 45-46, 48-49; CAAL 2, 5-7, 9-12.

Neither contention is accurate. A majority of California's appellate projects and half of its intermediate appellate courts follow *Anders* for criminal appeals, with no adverse effect on the projects, the courts, or the indigent appeals they handle. What the Warden and CAAL deem the "California system" is not one; there is no single "California system."

Moreover, what the Warden and CAAL promote as "the *Wende* procedure" is not required by any California law, doesn't follow the jurisprudence of the California Supreme Court, and isn't required or even permitted by *People v. Wende*. To the contrary: On the issue of advocacy in criminal appeals which is a central

issue before this Court, the California Supreme Court follows *Anders*, as it recently reiterated. *In re Sade C.*, 13 Cal.4th 952, 977-81, 55 Cal.Rptr.2d 771, 920 P.2d 716 (1996) [cited in CAAL 11]. This subject has been discussed in respondent Robbins' brief, Parts III, III(A)(1) and III(A)(2).

In discussing how California appellate projects and courts handle indigent appeals, *amicus curiae* wishes to emphasize that he does not criticize the institution of indigent appellate projects in California. His counsel is probably among the strongest supporters of the appellate projects, and he has the utmost respect for their attorneys and Executive Directors. He agrees wholeheartedly that the projects have "greatly professionalized criminal appellate practice in California." CAAL 8.

*Amicus curiae* simply recognizes—as do the majority of California's appellate projects—that there is no incompatibility between the existence and functioning of the appellate projects, and this Court's opinions in *Anders* and *Penson*. If anything, the latter can strengthen the former. *See infra*, p. 12 n.6.

#### B. Discussion

To begin with, the Warden's and CAAL's briefs create the impression of a single "California appellate project system" functioning uniformly throughout California, much like a unified private State Public Defender system.

There is no such thing. The five private appellate projects in California are not unified; they operate very differently, particularly when it comes to "no-merit briefs." Three of the five appellate projects, which handle the work in 9 of the 18 intermediate appellate courts or divisions in California, do not utilize the type of no-merit, no-advocacy form brief espoused by the Warden and CAAL. They follow *Anders* and *Penson*. The Warden and CAAL repeatedly mention the five appellate projects in support of their efforts to avoid *Anders*, WB 8, 13, 20-22;



CAAL 1-2, 6, 7, but they don't mention the fact that a majority of those appellate projects follow *Anders*, quite willingly.

The five appellate projects that handle California Court of Appeal cases are independent, private nonprofit organizations. Their roles grew out of the downsizing of the State Public Defender's office in the mid-1980s.

As one would expect from that evolution, the projects are separate private enterprises, not a unified statewide entity. Each is run by a different Executive Director, supported by different staff attorneys. Each has its own internal policies and procedures. Each accepts attorneys to its panels, rates attorneys, and makes recommendations matching them to cases, independently of the others—sometimes with striking variations; for example, an attorney who represents murder defendants in one project may be given only more routine cases in another. The projects often have very different views of organization, administration, and occasionally even law. Each project director manages his or her own organization as (s)he sees fit, subject to any practices of their own Courts of Appeal, which can vary greatly from court to court.

There are virtually no formal requirements on how appellate projects are to be structured or run. To the knowledge of *amicus curiae*, the only provisions on administration of noncapital indigent appeals are California Rule of Court 76.5 and Section 20 of the Standards of Judicial Administration Recommended by the California Judicial Council [both cited in CAAL 7; text reprinted *supra*, pp. vii-x]. These provisions provide few specifics, and they don't tell project directors how to run their organizations.

No-merit briefs are an area in which the appellate projects have sharply differing views. Some follow *Anders*. Some do not.

Three of California's five appellate projects follow *Anders*. Appellate Defenders, Inc. (ADI) of San Diego, the administrator for the three-division Fourth District Court of Appeal, has followed

*Anders* for almost two years. See *Appellate Defenders Issues*, No. 37, April 1999, p. 1. The First District Appellate Project (FDAP) of San Francisco began following *Anders* in October 1998, and recently reported that the five-division First District Court of Appeal has had no problems with *Anders* briefs. See letter from FDAP to panel attorneys, March 9, 1999, at 1. And based on a telephone conversation with a senior attorney, *amicus curiae* understands the Sixth District Appellate Project (SDAP) of San Jose has followed *Anders* for nearly a decade, since the opinion in *United States v. Griffy*, 895 F.2d 561 (9th Cir. 1990), which followed *Anders* and *McCoy* in rejecting a no-merit, no-advocacy form brief purportedly conforming to *People v. Wende*.<sup>4</sup>

The other two appellate projects do not follow *Anders*. The California Appellate Project (CAP) of Los Angeles, the project which was involved in the *Robbins* case now before this Court, reports that the seven-division Second District Court of Appeal rejects *Anders* in favor of the approach urged by the Warden and CAAL, and CAP does so as well. See letter from CAP to panel attorneys, May 25, 1999, at 2-3. And from a telephone conversation with a senior attorney, *amicus curiae* understands the Central California Appellate Program (CCAP) in Sacramento follows its two courts; the Third District Court of Appeal in Sacramento rejects *Anders*,<sup>5</sup> while the Fifth District in Fresno tends to reject *Anders* but often accepts *Anders*-styled briefs.

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<sup>4</sup> The Ninth Circuit's 1990 *Griffy* opinion, 885 F.2d at 562-563, belies the Warden's disparaging claim of "[t]he Ninth Circuit's sudden revelation of *Wende*'s invalidity." WB 43; see WB 20, 45-46. (The Warden's claim also doesn't take into account his error on what *Wende* held. See *supra*, pp. 8-9.)

<sup>5</sup> However, as of this writing (Saturday, June 19), *amicus curiae* Delgado is informed that the former Presiding Justice of the Third District Court of Appeal, Hon. Robert K. Puglia—one of California's most highly regarded jurists, who recently retired after more than 25 years of distinguished service with the Court—will be one of the *amici curiae* on another brief supporting respondent *Robbins* in this case.

ADI, FDAP, SDAP, CAP and CCAP are staffed by attorneys with expertise and experience, and are superb resources for California appellate attorneys. Each runs in its own way with its own policies on numerous issues including no-merit briefs. Thus, what the Warden and CAAL call a "California system" on no-merit briefs is followed by fewer than half of its appellate projects, and is rejected by more than half of its appellate courts including the California Supreme Court. Nothing suggests that *Anders* and *Penson* have caused any problems for projects that follow them, or for those projects' staff and panel attorneys.

Nor does anything in the Warden's or CAAL's briefs provide any reason why they should. Nothing in *Anders* or *Penson* prohibits an attorney from sharing confidential information with appellate project staff but not the court, or from making decisions based on confidential information. Compare CAAL 13-14. Nor does anything in *Anders* or *Penson* prohibit an appellate project from reviewing proposed *Anders* briefs. Compare CAAL 13-14. Appellate projects that follow *Anders* treat those briefs as other projects treat the no-merit briefs urged by the Warden and CAAL.<sup>6</sup>

The Warden and CAAL also contend that the no-merit, no-advocacy form briefs they support are better than *Anders* briefs, because the no-merit, no-advocacy form brief is said to be scrutinized by two different attorneys before it goes to the Court of Appeal. WB 8, 21, 23, 34; CAAL 6, 9-10, 13-14. Of course,

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<sup>6</sup> In fact, some project attorneys may be grateful for the increased guidance provided by an *Anders* submission. One senior appellate project attorney noted that his own task in reviewing no-merit briefs has become easier since his project began following *Anders*, for the same reason *Anders* is helpful to judges—it provides guidance to whoever is conducting the review, so (s)he doesn't have to "fly blind." See *infra*, p. 25. Some project attorneys may also be pleased with a system that helps ensure appointed counsel has done his or her job, and provides an extra incentive for appointed counsel not to be too hasty in concluding there are no arguable issues. See *infra*, p. 21 n.11.

two attorneys can just as easily scrutinize an *Anders* brief. See *supra*, p. 10. Moreover, the contention (i) is based on an unfounded or misleading premise, and (ii) fails to conform to this Court's *Anders* and *Penson* procedures, instituted to ensure protection of the indigent appellant and the integrity of the appellate process. *Amicus curiae* discusses (ii) in the next Part. He takes up (i) here.

The assertion that two attorneys fully review and assess the record on an indigent appellant's behalf is a substantial overstatement. That often doesn't happen; and there is certainly no state law requiring such duplicative work, let alone in every case.<sup>7</sup>

CAAL refers to two types of appointments, "assisted" and "independent" cases. CAAL 9. It cannot be assumed in either that two qualified attorneys do a complete and comprehensive review.

The very premise of an "assisted" case is that the attorney appointed for the appellant does not have the experience or expertise for the appellate project to assume that (s)he or can handle the case independently. See CAAL 8. In that situation, it may be literally true that two attorneys review the record on the defendant's behalf, as CAAL states. CAAL 10. However, only one of those attorneys is presumed qualified. CAAL states that about 40% of cases are assisted cases. CAAL 8.

The analysis is similar for independently appointed cases (the remaining 60%), only in reverse. The premise of an

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<sup>7</sup> In only one of the five appellate projects, covering one of the six California Courts of Appeal (the Sixth District, not involved in either Robbins' case or Delgado's), is the appellate project actually an attorney of record for the indigent appellant at the time the panel attorney files a brief, and even that doesn't occur in every case. Everywhere else, the project is almost never counsel of record along with the panel attorney at the time any brief is filed. (In the Second District, the project generally starts as counsel of record, but is later relieved if a panel attorney is appointed.)



independent case is that the appointed attorney has demonstrated the experience and expertise necessary to handle the case independently. (S)he decides what if any appellate issues should be briefed, and how to brief them. Thus while it is true that an appellate project attorney will request the transcripts for review, that review is often quicker and less detailed than the independent attorney's review is expected to have been.<sup>8</sup>

That is only logical. Each of the five projects has hundreds of attorneys on its panel. Each processes between about 500 and 3,000 criminal appeals per year, *see, e.g.*, Judicial Council of California, Court Statistics Report 107 (1998), plus juvenile and other indigent appeals. More serious appeals often require more time and resources. The appellate projects have between about 6 and 20 attorneys, who must not only review no-merit briefs, but also supervise every assisted case; monitor every independent case at a level of intensity varying with the experience of the panel attorney and the nature of the case; review all briefs and opinions; review and make recommendations on all claims for compensation

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<sup>8</sup> CAAL's brief doesn't seem entirely specific on this topic. CAAL does say the project attorney's review is "much more involved" for an assisted case than for an independent case, and the project attorney "will . . . normally conduct a complete review" in an assisted case. CAAL 9. In other words, project review in independent cases is often "much [less] involved" than an assisted case, and thus is less than a "complete review." That is *amicus curiae*'s point.

CAAL also states: "As a matter of standard practice, either the panel attorney will request that the project attorney review the entire record or selected portions of it or the project attorney will make that request." CAAL 9. CAAL doesn't say what this "standard practice" is supposed to be, or what its source is. Moreover, if it were truly "standard practice" in all independent cases for the project attorney to review the entire record, then why would the independent attorney ever need to ask the project attorney to "review the entire record," or "selected portions" thereof, if the project attorney was going to do it anyway? The somewhat hedged nature of the statement indicates the process is less than "standard." One would expect as much, as discussed in the text.

(a time-consuming and often sensitive task); provide support for and evaluations of panel attorneys; and usually, handle some of their own cases as well. And each project is on a limited budget.

Moreover, there is no statute, rule or regulation that requires any project to review transcripts with any particular degree of intensity for an independent no-merit brief. Practices vary from project to project, and will differ depending on the case and the attorneys involved. Appellate projects are certainly conscientious, and none would want to see a panel attorney miss issues. However, no one can know in advance which no-merit briefs will contain missed issues. And no appellate project could review every no-merit submission with the same thoroughness, intensity, and expenditure of time that one would expect from independent counsel. Nor would one expect them to. That would often be a waste of resources, since one presumably qualified attorney is already being paid to make that kind of review once.

Because the independent attorney is appointed as counsel of record, that is the attorney who is expected to do necessary legal research relevant to the facts of a case, and to request record augmentation for transcripts which are shown to be needed by careful review of the record. If the independent attorney hasn't done the work expected in one or both areas, the project attorney may simply be unable to figure that out. *See infra*, pp. 20-21.

*Amicus curiae* praises the role of the appellate projects in helping to decrease the number of erroneously filed no-merit briefs, since every one results in another appeal like Mr. Delgado's, where a person is entitled to advocacy and gets none. But their role should not be overstated, and it is incorrect to suggest that two qualified attorneys always—or even generally—do a full workup of every no-issue submission.



And even if two attorneys did review the record completely and comprehensively, review by a second attorney is still not a substitute for the constitutional requirements of advocacy and judicial review. *Amicus curiae* discusses that in the next Part.

Ironically, the Warden and CAAL rely on *People v. Hackett*, 36 Cal.App.4th 1297, 1311, 43 Cal.Rptr.2d 219 (1995). WB 20, 22; CAAL 11, 13. *Hackett* agreed strongly with respondent Robbins, and with *amicus curiae* here, in repeatedly emphasizing that a vital part of *Anders* and *Penson* is the requirement of advocacy by counsel filing a no-merit brief. See *Hackett*, 36 Cal.App.4th at 1301, 1307, 1309-10. That was the "[f]irst and foremost" reason why *Hackett* disagreed with the no-merit, no-advocacy form brief approach that it (erroneously) believed *Wende* called for. *Hackett*, 36 Cal.App.4th at 1309-10. Notably, *Hackett* was decided a year before the Supreme Court reiterated that it took the advocacy requirement of *Anders* seriously, and noted that it never said otherwise in *Wende*. *In re Sade C.*, 13 Cal.4th at 977-81; see *supra*, p. 9.

Having said all of that, this Part should be irrelevant. *Amicus curiae* recognizes that most of the facts in this Part were never briefed and are not in the record of his case or respondent Robbins' case. But because major portions of the Warden's and CAAL's arguments are premised on unsworn assertions of counsel made for the first time in this Court, *amicus curiae* must present a more balanced picture. That doesn't make any of it relevant.

Most importantly, whatever some or all of California's appellate projects might or might not do, the constitutional requirements of advocacy and judicial review are a vital part of an indigent person's guarantee of one meaningful appeal of right, established in *Douglas v. California*. This Court has made clear that these are necessities, not mere luxuries. *Penson*, 488 U.S. at 81-85. If there were any remaining doubt that this Court meant what it said in *Anders*, that doubt should have been dispelled by this Court's 8-1 opinion in *Penson* barely a decade ago.

### III. Legal Advocacy; Judicial Review

This Court's opinion in *Douglas v. California* established that an indigent appellant is entitled to legal advocacy. 372 U.S. at 357-58. "Although the Constitution does not ensure that every defendant receives the benefit of superior advocacy—how could it, given that half of all lawyers are below average?—it does entitle every defendant to the benefits of an advocate." *Castellanos v. United States*, 26 F.3d 717, 719 (7th Cir. 1994.)

The no-merit no-advocacy form brief espoused by the Warden and CAAL is not legal advocacy. A legal advocate provides a judicial decision-maker with legal points that are intended to assist the client in seeking relief, to the extent permitted by law. See, e.g., Black's Law Dictionary 55 (6th ed. 1991). A statement of facts, coupled with a boilerplate recitation that counsel doesn't see any issues, fails to qualify.

An *Anders* brief is legal advocacy. It may be a rather strange type of advocacy, see *McCoy v. Court of Appeals*, 486 U.S. at 439 n.13, since counsel sets forth issues and authorities, but doesn't argue them. See RB, Part II(A)(4). Certainly, if an attorney can make an actual legal argument, (s)he provides more and better advocacy to the client than (s)he would in an *Anders* brief. But an *Anders* brief is still advocacy. In an *Anders* brief, appointed counsel effectively tells the court: "I believe this appeal has no arguable issues. But I could be wrong, since everyone, myself included, can make mistakes. So I submit these points and authorities to guide this Court and maximize the chances that my client can get relief if (s)he is entitled to it." That last sentence is what *any* appellate advocate does, in a merits or a no-merit brief.

A proper no-merit brief would combine constitutionally required advocacy, with the ethical duty not to argue frivolous issues. That is the brief required by *Anders* and *Penson*.<sup>9</sup>

Looked at from a different perspective, if appointed counsel files a brief, then *Douglas v. California* requires that the brief must contain advocacy. And appointed counsel is clearly obligated to file some brief. Otherwise, an attorney would have the final say on whether the indigent person would obtain an adequate appeal, an approach this Court has repeatedly rejected. *Anders v. California*, 386 U.S. at 744; *Lane v. Brown*, 372 U.S. 477, 485 (1963); *Ellis v. United States*, 356 U.S. at 675.

The Warden seeks to distinguish *Penson* on the ground that in Robbins' case, appointed counsel filed a no-merit no-advocacy form brief but then didn't move to withdraw, whereas appointed counsel did move to withdraw in *Penson*. WB 29, 32, 46. That claimed distinction is the linchpin of the Warden's effort to apply *Strickland v. Washington*, 466 U.S. 668 (1984) to this case, since this Court has already rejected the claim that *Strickland* applies to no-merit no-advocacy briefs. *Penson*, 488 U.S. at 86, 88-89; *see id.*, Br. for Respondent, No. 87-6116, Part I [arguing applicability of *Strickland* to brief that did not meet requirements of *Anders*].)

If that is a distinction, it is one without a difference. An attorney who engages in no advocacy, whether or not (s)he moves to withdraw, provides the same amount of advocacy: None. Neither course satisfies any constitutional requirement. "That a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command." *Strickland v. Washington*, 466 U.S. at 685. "The Constitution's guarantee of

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<sup>9</sup> Some states waive ethical prohibitions against frivolous arguments in indigent criminal appeals. *See, e.g., Ramos v. State*, 113 Nev. 1081, 1084-85, 944 P.2d 856 (1997); *State v. Cigic*, 138 N.H. 313, 318, 639 A.2d 251 (1994). In those states, literal adherence to *Anders* may not be needed, as a frivolous issue can be argued to avoid a no-merit brief. California is not such a state.

assistance of counsel cannot be satisfied by mere formal appointment." *United States v. Cronin*, 466 U.S. 648, 654-55 (1984) [citation omitted].

The above should be dispositive. *Douglas v. California*, and *Anders*, *McCoy* and *Penson* which followed it, hold that as long as a state accords one appeal of right in a criminal case, then the Constitution requires advocacy on behalf of an indigent person in that one appeal. No-merit briefs are no exception.

Beyond that, the fact that counsel must file a brief, and cannot unilaterally withdraw an indigent client's appeal, further supports this Court's requirements in *Anders* and *Penson*. If an attorney must file a brief in a reviewing court, then the court has a live appeal and must perform its essential functions. A court in our adversarial system cannot perform its functions without partisan advocacy. *Herring v. New York*, 422 U.S. 853, 862 (1975).

*Douglas v. California* requires that appointed counsel must provide that partisan advocacy. 372 U.S. at 357-58. It would be constitutionally unacceptable under *Douglas*, based on a lack of partisan advocacy, for counsel to file a brief that merely said: "I reviewed the record, and I see nothing to this appeal. By the way, another attorney concurs." *See also supra*, p. 18. There is no difference between that brief, and a brief that says the same thing but also copies some facts and procedural history into the record.

Thus, respondent's approach is a logical and necessary outgrowth of *Douglas*. A court, not an attorney or an appellate project, is charged with adjudicating an appeal. The court must decide the appeal even if appointed counsel assures the court that the appeal is not worth deciding, or gets another attorney's concurrence. Moreover, no reviewing court is bound by concessions of counsel on questions of law, *see, e.g., Orloff v. Willoughby*, 345 U.S. 83, 87 (1953), which of course include concessions of counsel that there are no legal issues to decide.



Consequently, this Court held in *Anders* that after a no-merit brief is filed, "the court—not counsel—then proceeds, after a full examination of all of the proceedings, to decide whether the case is wholly frivolous." *Id.* at 744; *Penson*, 488 U.S. at 80.

Consider Mr. Delgado's case. An "independent" panel attorney proposed to file a no-merit no-advocacy form brief. Unbeknownst to everyone, he had utterly failed in two vital duties. First, at least two superb appellate issues were available to be spotted—issues which were so good that when Delgado argued them in the Ninth Circuit in support of the grant of habeas relief, the Warden made no effort to rebut them in his reply.<sup>10</sup> (A reply would have been needed to prevent those issues from being alternative grounds for affirmance. See *United States v. American Railway Express Co.*, 265 U.S. 425, 435-36 (1924) [court reviews lower court's result, not its reasoning].) Second, proper record augmentation of motion proceedings was essential for intelligent evaluation of other possible issues suggested by the existing record.

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<sup>10</sup> One of the issues was total denial of the advocacy of counsel at sentencing, which is a "critical stage" of the proceedings. *Mempa v. Rhay*, 389 U.S. 128, 134-37 (1967). Denial of counsel at a critical stage is reversible error *per se*. *United States v. Cronin*, 466 U.S. at 659; *Strickland v. Washington*, 466 U.S. at 692; *United States v. Gonzales*, 113 F.3d 1026, 1029 (9th Cir. 1997). The other was the major conflict on the part of Delgado's "stand-in counsel," who was in the process of getting her client an extraordinary result of probation over the prosecutor's strong objection. See *supra*, p. 4. "Stand-in counsel" had a strong incentive not to 'rock the boat' by getting a good result for a co-defendant, because that would increase the possibility the prosecutor would become fed up and pull out of the plea agreement, ruining her client's extraordinary result. That conflict, which should have been apparent to the trial court, see *Delgado v. Lewis*, 168 F.3d at 1154, was reversible error. See *Wood v. Georgia*, 450 U.S. 261, 271-74 (1981). Mr. Delgado's bare agreement to conflicted "stand-in counsel," without any advisement that he had a right to his own attorney or the existence or nature of the conflict, was not a waiver of the conflict. See *People v. Mroczko*, 35 Cal.3d 86, 110, 197 Cal.Rptr. 52, 672 P.2d 835 (1983); *Glasser v. United States*, 315 U.S. 60, 70-72 (1942).

However, the independent panel attorney, perhaps after an overly hasty review or a preconceived idea that nothing would turn up in a short guilty plea transcript, was grossly deficient in these essential and routine tasks. The appellate project staff attorney who reviewed the panel attorney's no-merit submission was one of the finest criminal appellate lawyers in California, but he had no way to know the independently appointed attorney had so thoroughly failed in his duties. Thus without any guidance from the appointed panel attorney; having only limited time and resources with which to conduct a review; and not being counsel of record with the primary responsibility of legal research and ordering missing transcripts, he didn't find the issues either.<sup>11</sup>

After the no-merit no-advocacy form brief was filed, Mr. Delgado filed a *pro. per.* brief with the help of a "jailhouse lawyer." See *supra*, p. 6. The matter then went to the Court of Appeal, which had no useful materials to guide it in evaluating the cold record before it. It is no wonder that the Court of Appeal could do no more than say, "We have now concluded our independent review of the record and find no arguable issues. The judgment is affirmed." DER 226-28. Appellate judges can't do their jobs if the parties' counsel don't do theirs.

Deciding appeals is not the only judicial function impaired by a no-merit no-advocacy form brief. A reviewing court is also ultimately responsible for safeguarding the integrity of the judicial process, as well as its essential nature, *i.e.*, its conformance with fundamental fairness and the law of the jurisdiction.

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<sup>11</sup> An *Anders* brief would surely have been helpful to the project attorney in doing his job. At the same time, an *Anders* brief might also have prevented the entire problem by forcing appointed counsel to think carefully about the appeal, rather than hurrying through it on a superficial level, because he would have had to put his legal thoughts on paper in a publicly filed brief. See *Penson*, 488 U.S. at 81 n.4; RB, Part II(A)(3).



No court can delegate essential functions of an adversarial justice system. For example, an attorney cannot decide whether a defendant is competent to be tried, or what instructions to give a jury. Here, an attorney cannot usurp the judicial function of deciding whether an indigent person's constitutional guarantee of advocacy will be respected. That, however, is the end result when the attorney files a no-merit no-advocacy form brief, and thus gives the court no guidance in determining whether the appeal lacks arguable legal issues.<sup>12</sup>

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<sup>12</sup> Along with its role in safeguarding the integrity of the judicial process and an indigent appellant's right to counsel, the court's involvement in reviewing no-merit briefs compensates to an extent for the indigent person's complete inability to obtain one constitutional right that a person of means has—the right to “counsel of his own choice.” *Powell v. Alabama*, 287 U.S. 45, 53 (1932) [italics added]; see also *Flanagan v. United States*, 465 U.S. 259, 267-68 (1984). That right is important to a person of means, as it enables him or her to utilize the free market to retain the attorney in whom (s)he reposes the greatest trust. See, e.g., *Heine v. Colton, Hartnick, Yamin & Sheresky*, 786 F.Supp. 360, 368 (S.D.N.Y. 1992). If that attorney concludes there are no arguable issues, the person of means can obtain from trusted counsel of choice a detailed opinion letter discussing possible issues with specific strengths and weaknesses. See *McCoy v. Court of Appeals*, 486 U.S. at 439 n.12.

By contrast, an indigent person has no constitutional right to counsel of choice. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 (1989). While the indigent person has no right to choose an attorney in whom (s)he has particular trust, the court can compensate to an extent; it can choose an attorney in whom it at least has sufficient trust to warrant making an appointment. As a society, we repose trust in our judiciary to make such decisions impartially, since it is the branch of government most embodying neutrality in our system of justice. Thus, if appointed counsel concludes there is nothing to argue in an appeal, then instead of the indigent client obtaining an opinion letter from an attorney of choice in whom (s)he has particular trust (since the indigent client has no right to counsel of choice), the court must obtain something akin to an opinion letter from the attorney of its choice, in whom it has reposed trust. That “opinion letter” which counsel directs to the entity that hired him or her, the appointing court, is the *Anders* brief.

(continued...)

As respondent Robbins has shown, the State of California made the same claim in *Anders* that it does now, and this Court rejected it in *Anders*. RB, Part III(B)(2). The State claimed then as it does now that the presence of a second attorney vitiates the constitutional requirements of (i) an advocate's brief, and (ii) a judicial determination of whether an appeal has no arguable issues. In fact, the State asks this Court to decide this claim a third time, as this Court also rejected it nine years before *Anders*.

In *Anders* and *Penson*, this Court relied on its opinion in *Ellis v. United States*, 356 U.S. 674 [“*Ellis II*”]. See *Anders*, 386 U.S. at 741-42, 743; *Penson*, 488 U.S. at 82-83. In *Ellis II*, this Court reversed the opinion of the Court of Appeals, and rejected a “no-merit no-advocacy” submission:

In this case, it appears that the two attorneys appointed by the Court of Appeals, performed essentially the role of amici curiae. But representation in the role of an advocate is required. If counsel is convinced, after conscientious investigation, that the appeal is frivolous, of course, he may ask to withdraw on that account. If the court is satisfied that counsel has diligently investigated the possible grounds of appeal, and agrees with counsel's evaluation of the case, then leave to withdraw may be allowed. . .

*Ellis II*, 356 U.S. at 675.

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<sup>12</sup>(...continued)

Needless to say, no private client would be satisfied with an opinion letter from counsel of choice that recited facts and procedure, and concluded, “I’m not going to tell you anything about the law, but I stand ready to do whatever you want.” Similarly with appointed counsel, the appointing court would not be satisfied with such an uninformative opinion letter from its counsel of choice. *Anders* makes clear the court is entitled to more.

This holding, like *Anders*, made clear that counsel must engage in advocacy to convince the court that counsel “has diligently investigated the possible grounds of appeal,” and must present an “evaluation of the case” to the court. That was also the conclusion of the dissenting opinion in the Court of Appeals, later echoed by this Court in its unanimous reversal of the majority opinion. *Ellis v. United States*, 249 F.2d 478, 480 (D.C. Cir. 1957) (Washington, J., dissenting) [*“Ellis I”*], *rev’d*, 356 U.S. 674.

The no-merit no-advocacy procedure rejected by this Court in *Ellis II* involved the appointment of two lawyers—the same number which California now urges is enough, and one more than California courts actually appoint for indigent appellants. The appointed lawyers in *Ellis* were highly qualified; “one . . . was formerly employed on the staff of this court [the D.C. Circuit] and both . . . served as Assistant United States Attorneys in this jurisdiction.” *Ellis I*, 249 F.2d at 479. Appointed counsel “[made] a thorough and detailed statement of the facts, based on interviews with the trial judge, appellant’s trial counsel, the prosecuting attorney, the court reporter, one of the government witnesses, and the defendant.” *Id.* at 478-79. They concluded in the no-merit brief that there was only one “possible” area of error, probable cause; but based on the facts, it wasn’t an issue. *Id.* at 479.

That is a lot more representation than the “no-merit no-advocacy” form brief advocated by the Warden and CAAL, yet this Court held in *Ellis II* that it wasn’t enough. The reason was the same one *amicus curiae* has argued: “[R]epresentation in the role of an advocate is required.” *Ellis II*, 356 U.S. at 675.

In their effort to avoid *Anders* and *Penson*, CAAL also argues that a court is in a difficult position when it has to review a record, because a court is not an advocate for a defendant. CAAL 13. *Amicus curiae* agrees that a court is not an advocate, but that makes advocacy all the more essential. For in our adversarial system, a court first and foremost requires guidance from the litigants. This Court has recognized as much:

“[T]ruth,” Lord Eldon said, “is best discovered by powerful statements on both sides of the question.” This dictum describes the unique strength of our system of criminal justice. “The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted [and sentenced according to law] and the innocent go free.” *Herring v. New York*, 422 U.S. 853, 862.... Thus, the adversarial process protected by the Sixth Amendment requires that the accused have “counsel acting in the role of an advocate.” *Anders v. California*, 386 U.S. 738, 743 (1967).

*United States v. Cronin*, 466 U.S. at 655. A reviewing court is ultimately responsible for ruling on issues of law—and the issue of whether any legal issues exist is certainly one—but it can’t do so in a vacuum. It requires advocacy to guide it. That is a central purpose and function of an *Anders* brief.

CAAL contends that its preferred no-merit no-advocacy form brief “mak[es] continuity of representation possible in case the appellate court does find arguable issues.” CAAL 2, 5, 12. It isn’t yet clear that “continuity of representation” is permissible after a no-merit brief. *Cf. Penson*, 488 U.S. at 83, 85 [appointed counsel who files a no-merit brief must ask to withdraw; if the court finds an issue, it appoints new counsel]. Assuming for this argument that “continuity of representation” is permissible, the contention overlooks a basic question that a court would always have to ask: Is “continuity of representation” warranted and desirable?

Neither a court nor an indigent person would want “continuity of representation” by an attorney who has already rendered professionally deficient representation. In Mr. Delgado’s case, the appointed attorney had been grossly ineffective; he missed two easily recognizable issues, and failed to obtain a proper



record for evaluating other possible issues. If the Court of Appeal had been guided toward recognizing this with the assistance of an *Anders* brief, it would likely have discontinued the appointment of the attorney who had already provided professionally unreasonable representation. In the unlikely event the Court didn't do so on its own, Mr. Delgado would have had cause to make that request. Instead, the Court of Appeal had no way to figure this out, as it didn't have an *Anders* brief to help it spot issues and omissions.

A court's decision on whether to have appointed counsel continue on the case (again, assuming *arguendo* that is permissible) would be better informed with an *Anders* brief on file. From the presentation of the issues and the overall quality of the *Anders* brief, the court can make a reasoned determination of whether appointed counsel is likely to render effective assistance in filing a supplemental brief.

For example, if counsel spotted and discussed the issue that led the court to request further briefing, but merely misjudged the scope of appellate review (e.g., didn't recognize that *de novo* review might be used, and thought abuse of discretion was the standard), then the court might still conclude (s)he was conscientious, and would advance the indigent client's cause zealously in supplemental briefing on a specified issue. In Mr. Delgado's case, a hypothetical attorney using *Anders* might have flagged the issue of a Sixth Amendment denial at sentencing, but failed to argue it due to an erroneous belief that *Strickland v. Washington* (ineffective advocacy) rather than *United States v. Cronin* (total denial of advocacy) was the standard. A court spotting the *Cronin* issue might continue counsel's appointment nonetheless, if (s)he wrote a good *Anders* brief. If on the other hand, the *Anders* brief was of poor quality, then the court might decide that appointing another attorney was essential to ensure proper functioning of the adversarial process and protect the indigent appellant's right to counsel.

By contrast, if appointed counsel has filed only a no-merit no-advocacy form brief, the reviewing court has no guidance in this important decision. That is what happened to Mr. Delgado. He needed real representation by a zealous advocate, i.e., new counsel, not continuity of a "warm body." Unfortunately, his Court of Appeal had no effective way to figure that out.

All of this underscores *amicus curiae's* point. It is the court, not an attorney or appellate project, that must determine whether it is appropriate and desirable to have "continuity of representation." Forcing "continuity of representation" upon a court involuntarily, by not giving it adequate information for an informed choice, does not assist it in its vital and constitutionally required tasks of protecting the integrity of the judicial process and safeguarding the indigent person's right to counsel.<sup>13</sup>

The Warden argues that states should be able to adopt their own methods for handling "no-merit" briefs in indigent appeals. WB 14, 27-28. They can, but only subject to the constitutional guarantees of *Douglas v. California*, and *Anders, Penson* and *McCoy* which follow it. One could hardly argue that a state can permit appointed trial counsel to conduct no cross-examination and present no defense case or argument. See *State v. Lamoreaux*, 22 Ariz.App. 172, 525 P.2d 303 (1974) [reversing after "no-advocacy trial"]. Nor would that be permissible if someone on the local indigent defense panel concurred. A "no-advocacy appeal" is no more an option than a "no-advocacy trial," for it too lacks informed judicial decision-making and an adversarial process.

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<sup>13</sup> CAAL expresses concern that appointing new counsel after a no-merit brief in a case with "thousands of pages" of record would be expensive. CAAL 13. If original counsel's representation was seriously deficient, then a court would probably appoint new counsel anyway, regardless of record length. But in reality, relatively few no-merit briefs are filed in cases with huge records. Most are in cases with small records, often in appeals after guilty pleas.



Finally, the Warden's effort to urge a "prejudice" analysis, when an indigent person has been denied even a minimal level of advocacy, *see* WB 9-10, 30-34, 42, is a reprise of Ohio's effort to do the same 10 years ago in *Penson*. *See id.*, Br. for Respondent, No. 87-6116, Part II ["harmless error" argument]. This Court rejected the effort in *Penson*: "Mere speculation that counsel would not have made a difference is no substitute for actual appellate advocacy, particularly when the court's speculation is itself unguided by the adversary process." 488 U.S. at 87. (The Warden's claim under *Teague v. Lane*, 489 U.S. 288 (1989) is equally misplaced. Respondent Robbins seeks a straightforward application of *Penson* and *Anders*; since this Court decided those cases 10 and 32 years ago, obviously, neither is a "new rule.")

When an appellant's counsel fails to engage in any advocacy, the appellant has been denied the most fundamental role of an attorney in a court of law, as surely as if the attorney had wholly failed to take some other step required to perfect the client's appeal. A court doesn't engage in "prejudice" analysis after a total denial of the advocacy of counsel at the trial level; a defendant is not required to show what the result would have been if someone had given him an attorney-advocate. *United States v. Cronin*, 466 U.S. at 658-59 & n.25; *Strickland v. Washington*, 466 U.S. at 692. *Penson* logically follows in stating the same rule for appeals.

In such circumstances, the First Circuit's observations are *à propos*:

We do not see how the right to appeal and to effective assistance of counsel in connection therewith can be adequately vindicated if, as a condition to any relief, petitioner must first establish—without the assistance of any counsel—that he has a non-frivolous or arguably meritorious issue to present on appeal. Requiring an initial demonstration of merit from an unrepresented

defendant as a condition to remedying the involuntary loss of appellate rights would deprive the defendant of one of the very benefits of appellate counsel—review by counsel for the purpose of identifying potential appellate issues. *See Anders v. California*, 386 U.S. 738, 744-45....

*United States v. Tajeddini*, 945 F.2d 458, 467 (1st Cir. 1991) (per curiam; before Breyer, Campbell and Selya, JJ.). As *Penson* makes clear, no less is true in the context of no-merit briefs.

## CONCLUSION

No legal system is perfect. Attorneys, like judges, do make legal errors. But Mr. Delgado's case, like that of respondent Robbins, involved the most fundamental type of error of all: An attorney's determination that an indigent client has no right to the assistance of counsel in his one appeal of right, the only right he has to assert legal error below. *See McCoy v. Court of Appeals*, 486 U.S. at 440 n.13. As this Court recognized in *Anders* and *Penson*, a court cannot accept that determination without making an effort to verify it. In turn, a court cannot effectively verify it without the guidance of counsel.

Contrary to *Anders* and *Penson*, the approach urged by the Warden and CAAL was used in Mr. Delgado's case. As a result, a fundamental breakdown in Mr. Delgado's sentencing couldn't be fixed on appeal, because the appellate system was rendered incapable of spotting *its own* fundamental breakdown. The Ninth Circuit eloquently described the result:

The absence of any meaningful legal assistance in this case makes a mockery of the representation of indigent defendants contemplated by the Supreme Court in *Anders, Penson, Strickland*, and *Gideon v. Wainwright*, 372 U.S. 335 (1963). Clearly established constitutional law requires competent advocacy in criminal defense, not shadowboxing. To hold otherwise would, to paraphrase Eliot, render the clear sound of Gideon's trumpet quiet and meaningless as wind in dry grass.

*Delgado v. Lewis*, 168 F.3d at 1154-55.

*Amicus curiae* Delgado joins respondent Robbins in asking this Court to affirm the judgment of the Court of Appeals.

Dated this 21st day of June, 1999.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael B. Dashjian", with a large, sweeping flourish extending to the right.

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JUN 21 1999

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No. 98-1037

In The  
**Supreme Court of the United States**

GEORGE SMITH, WARDEN,

*Petitioner,*

v.

LEE ROBBINS,

*Respondent.*

On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Ninth Circuit

**BRIEF FOR AMICUS NATIONAL ASSOCIATION  
OF CRIMINAL DEFENSE LAWYERS  
IN SUPPORT OF RESPONDENT**

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BRIEF OF AMICUS NATIONAL ASSOCIATION  
OF CRIMINAL DEFENSE LAWYERS

This brief amicus curiae is submitted in support of Respondent Lee Robbins. By letters filed with the Clerk of the Court, Petitioner and Respondent have consented to the filing of this brief.<sup>1</sup>

## INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members, including representatives from all fifty states. The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner.

In NACDL's view, there are three separate but overlapping issues presented in this case: (1) what actions of an assigned appellate counsel best serve the interests of a

<sup>1</sup> As required by Rule 37.6 of this Court, *amicus curiae* submits the following: no party or party's counsel authored this brief in whole or in part; no person or entity other than *amicus curiae*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

convicted defendant; (2) what are the ethical and constitutional obligations of defense counsel when assigned to represent a convicted indigent defendant on appeal; (3) what rule as to the obligations of assigned appellate counsel best serves the institutional interests of the criminal justice system.

NACDL, consistent with its mission, files this brief amicus curiae in support of Respondent's claim that the requirements of *Anders v. California*, 386 U.S. 738 (1967) establish the minimum constitutional standards for appointed appellate counsel. NACDL rejects Petitioner's argument that the California modification of *Anders* in *People v. Wende*, 25 Cal.3d 436, 158 Cal. Rptr. 839 (Cal. 1979) satisfies the basic constitutional requirements established by this Court or the assertion of the Amicus Criminal Justice Legal Foundation that *Anders* creates "an impossible ethical dilemma for appointed counsel." (Amicus Brief at 10). NACDL believes that the *Anders* standard best reconciles and serves the interests of defendant, counsel and the system.

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#### STATEMENT

Amicus adopts petitioner's statement of the case.

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#### SUMMARY OF ARGUMENT

The requirements of *Anders* fulfill the constitutional mandate of effective assistance of counsel for indigent defendants convicted of a crime and seeking to appeal

their conviction. *Douglas v. California*, 372 U.S. 353 (1963). Assigned counsel must examine the record, identify possible appeal issues and prepare a written brief for a reviewing court. In this manner, counsel acts as an active advocate for his client, examining and describing all possible bases for appeal, thus aiding the defendant to identify issues for a possible pro se brief and assisting the reviewing court who would otherwise have to examine a cold record without guidance. In the majority of cases, having followed the requirements of *Anders*, counsel will prepare a full merits brief based on the issues he or she identified as a possible basis for appeal. The California procedure at issue here, which purportedly eliminates the need to identify possible appeal issues, does not and cannot satisfy the requirements of *Anders*. It shortcuts the process, assisting neither the defendant who is afforded no guidance on possible appeal points, nor the reviewing court, who must examine a cold record for possible errors.

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#### ARGUMENT

#### THE REQUIREMENTS OF *ANDERS* WERE NOT MET IN THIS CASE, REQUIRING REVERSAL OF THE CONVICTION

This Court established the basic standards for assigned appellate counsel in *Anders*. The rule in that case was "based on the underlying constitutional right to appointed counsel established in *Douglas v. California*, 372 U.S. 353 (1963)" as this Court noted in *Pennsylvania v. Finley*, 481 U.S. 551, 554 (1987). Since "denial of counsel to



indigents on first appeal as of right amounted to unconstitutional discrimination against the poor," *id.*, this Court required that counsel appointed pursuant to *Douglas* must act as a true advocate for his client, even if "that attorney has conscientiously determined that there is no merit to the indigent's appeal," *Anders*, 386 U.S. at 739.

In *Anders*, counsel had been appointed to represent an indigent defendant on appeal. He examined the record and determined that there were no meritorious issues to raise on appeal and submitted a "no merit" letter to the appeal court, in accordance with the procedure then in effect in California.

"I will not file a brief on appeal as I am of the opinion that there is no merit to the appeal. I have visited and communicated with Mr. Anders and have explained my views and opinions to him \* \* \*. (H)e wishes to file a brief in this matter on his own behalf." 386 U.S. at 742.

This Court held that counsel's actions were insufficient to satisfy the requirements of the Sixth Amendment as interpreted by this Court in *Gideon v. Wainwright*, 372 U.S. 335 (1963) and *Douglas v. California*, 372 U.S. 353 (1963). "We believe that counsel's bare conclusion, as evidenced by his letter, was not enough." This Court explained:

The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client. . . . The no-merit letter and the procedure it triggers do not reach that dignity. . . . His role as advocate requires that he support his client's appeal to the best of his ability. *Id.* at 744.

On the other hand, if counsel truly finds no issues to argue on appeal, he must nevertheless point out issues that a reviewing court might consider relevant:

Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court – not counsel – then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal. *Id.* at 744.

This requirement, the Court found, did not "force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain." By contrast, the California "no-merit" procedure rejected by this Court "affords neither the client nor the court any aid. The former must shift entirely for himself, while the court has only the cold record which it must review without the help of an advocate." *Id.* at 745.

This Court later explained the twin requirements of *Anders*. "The so-called *Anders*-brief serves the valuable purpose of assisting the court in determining both that counsel in fact conducted the required detailed review of the case and that the appeal is indeed so frivolous that it may be decided without an adversary presentation." *Penson v. Ohio*, 488 U.S. 75, 81-82 (1988).

The procedure allegedly established by California in *People v. Wende*, 25 Cal.3d 436, 158 Cal. Rptr. 839 (1979) does not meet the requirements of *Anders*.<sup>2</sup> The California procedure, as described by Petitioner, allegedly required counsel to examine the record and file a brief outlining the facts of the case. However, counsel was not required to identify any arguable issues that he or she found frivolous. Instead the court was obliged to "conduct a review of the entire record whenever appointed counsel submits a brief which raises no specific issues or describes the appeal as frivolous." *Wende*, 25 Cal.3d at 441.

The Ninth Circuit correctly found this procedure to be inadequate.

It is apparent that those requirements [of *Anders*] were not met. Robbins's appointed

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<sup>2</sup> There is a substantial question whether Petitioner's Brief correctly describes the *Wende* procedure. See Petitioner's Brief at 8, 18-19. The idea that *Wende* expanded or "enlarged" the requirements of *Anders* is impossible to credit, as explained in the text. In any event, it appears that the rationale of *Wende*, that appellate review of the record is an adequate substitute for attorney identification of issues, has been subsequently rejected by the California courts. See *In re Sade C.*, 37 Cal. App. 4th 88, 112, n. 18, 44 Cal.Rptr. 2d 509 (1995).

counsel neither provided active and vigorous appellate representation nor complied with *Anders*. . . . The brief filed on Robbins's behalf completely failed to identify any grounds that arguably supported an appeal. Rather, it briefly summarized the procedural and historical facts of the case and requested that the state appellate court "independently review the entire record for arguable issues." Accordingly, the district court correctly found that Robbins's counsel did not comply with *Anders*.

152 F.3d at 1067.

The minimum *Anders* requirements of counsel review of the record, identification of arguable issues and presentation of a brief to an appellate court serves the needs of the indigent defendant, the ethical requirements and constitutional responsibilities of counsel and the institutional needs of the criminal justice system in manner that the watered-down *Wende* procedure does not.

As a practical matter, requiring counsel to look for and identify arguable non-frivolous issues often leads to counsel actually arguing those issues in a full merits appeal. Defense counsel, like most lawyers, do not like to engage in useless or unnecessary activity. Having read the record and identified a legal issue or legal issues that could be raised on appeal, the majority of criminal defense counsel will present such issues in a full appeal, rather than bow out and simply note them for possible review by the appeal court.<sup>3</sup> This is the basis for the

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<sup>3</sup> The State of Arizona in its *Amicus* brief cites figures showing that in eleven states cited the average number of

*Anders* rule: "A proper interpretation of the *Anders* decision, however, reveals a workable and just procedure for dealing with frivolous appeals. If appointed, counsel should conscientiously examine the record to determine whether any issues support reversal. Counsel should not speculate on the likely success of an appeal, but instead must evaluate the record as an advocate, making the most powerful arguments justified by the facts." Note, "The Right to Counsel in 'Frivolous' Appeals: A Reevaluation of the Guarantees of *Anders v. California*," 67 Tex. L. Rev. 181, 187 (1988).

Even if counsel determines the issues are frivolous, the identification of a legal issue benefits the defendant who, at the least, knows what legal issues can be raised in a pro se brief. It also assists the appellate court by pointing to issues that it may require to be fully briefed.

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*Anders* appeals was about 20% in 1993-94. But the same law review article cited as the basis for the figures indicates that in most jurisdictions, the percentage of *Anders* briefs is far less. Furthermore there is a great variation within the states. The author comments: "How state courts have addressed the *Anders* issue varies widely. Ten states have rejected the *Anders* procedure. In some states, the public defenders refuse to file such briefs. A survey of the courts of appeal following the *Anders* procedure reveals that the percentage of the criminal caseload comprised of *Anders* appeals varies widely – from less than one percent, to a high of thirty-nine percent, of the total filings. The internal process each court uses in reviewing an *Anders* brief also differs markedly. The survey results show that handling *Anders* appeals continues to be an analytical and managerial problem for state appellate courts." See Warner, "Anders in the Fifty States: Some Appellants' Equal Protection is More Equal Than Others," 23 Fla. State U.L. Rev. 625, 642-43, 668, fn. 225, 228 (1996) and Appendix.

On the other hand, simply requiring an appellate lawyer to review the record, describe the facts and the law without identifying arguable issues does not put the same pressure on counsel to fully argue the case. He or she cannot be a "active advocate" for his client by merely summarizing the historical and procedural facts, as occurred in this case. This diluted procedure certainly does not assist the defendant to identify issues to be presented in a pro se brief. Nor does it assist an appellate court in determining whether the appeal is truly frivolous or not. With only a general description of the case and without the identification of arguable issues, an appeal court is without the ability to make reasoned decisions about the merits of a full appeal.

Against this argument, petitioner and his supporting amici contend that counsel's identification of issues as frivolous and non-worthy of appeal somehow works against the interest of the defendant. "The Janus-faced *Anders* brief filed by counsel is often either perfunctory or a brief against the client," i.e., by identifying issues and declaring them frivolous, an *Anders* brief poisons the minds of reviewing courts who examine the issues at later stages of the proceedings. See Brief of Amicus Criminal Justice Legal Foundation at 11.

It is difficult to see how the alleged *Wende* procedure, which requires only a factual and procedural presentation of the case, is more complete or less "perfunctory" than the *Anders* brief. Furthermore, as noted above, in the great majority of cases, appellate counsel do not file *Anders* briefs. The pressure to identify issues generally leads counsel to file full merits appeals on those issues, thus fulfilling the dictates of *Douglas*.



*Anders*, as presently interpreted by the Court below, fulfills this Court's original direction and purpose. It assists the system "in determining both that counsel in fact conducted the required detailed review of the case and that the appeal is indeed so frivolous that it may be decided without an adversary presentation." *Penson v. Ohio*, 488 U.S. 75, 81-82 (1988). More important, it requires counsel and not busy appellate courts to do the detailed examination of the record and research into possible appeal points.

The California procedure under examination in this case did not meet the requirements of *Anders* and did not satisfy the Sixth Amendment requirement of assistance of counsel as interpreted by this Court. That failure was prejudicial as a matter of law. See *Allen v. United States*, 938 F.2d 664, 665 (6th Cir. 1991): "... appellate counsel's failure to meet the requirements of *Anders* is presumptively prejudicial. . . ." See also *Davis v. Kramer*, 167 F.3d 494 (9th Cir. 1999) (failure to file brief meeting requirements of *Anders* leaves defendant without counsel and is presumptively prejudicial under *Penson*); *Delgado v. Lewis*, 168 F.3d 1148 (9th Cir. 1999) (failure to follow *Anders* requirements constitutes ineffective assistance of counsel). See generally Note, "The Right to Counsel in 'Frivolous Appeals: A Reevaluation of the Guarantees of *Anders v. California*," 67 *Tex. L. Rev.* 181, 184 (1988), arguing for a *per se* rule: "This Note argues that courts should not require an indigent to show prejudice when counsel either withdraws from an appeal without complying with

*Anders* or fails to prosecute the appeal as an active advocate."

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## CONCLUSION

For the reasons stated above, the decision below should be affirmed.

Dated: New York, N.Y.  
June 21, 1999

Respectfully submitted,  
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IN THE  
**Supreme Court of the United States**

GEORGE SMITH, Warden,  
*Petitioner,*

v.

LEE ROBBINS,  
*Respondent.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit

**BRIEF FOR AMICI CURIAE RETIRED JUSTICES  
ARMAND ARABIAN, EDWARD T. BUTLER, ROBERT  
FEINERMAN, CHARLES W. FROELICH, JR.,  
JOSEPH R. GRODIN, ROBERT F. KANE, J. CLINTON  
PETERSON, MICHAEL J. PHELAN, ROBERT K.  
PUGLIA, RICHARD SCHAUER, ROBERT S. THOMPSON,  
EDWARD J. WALLIN, AND GEORGE N. ZENOVICH  
IN SUPPORT OF RESPONDENT**

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### **QUESTION PRESENTED**

**Whether California's no-merit procedure in criminal matters, whereby counsel do not identify issues to the California Courts of Appeal, compromises the effectiveness and efficiency of appellate review.**



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IN THE  
**Supreme Court of the United States**

No. 98-1037

GEORGE SMITH, Warden,  
Petitioner,  
v.  
LEE ROBBINS,  
Respondent.

On Writ of Certiorari to the  
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for the Ninth Circuit

BRIEF FOR *AMICI CURIAE* RETIRED JUSTICES  
ARMAND ARABIAN, EDWARD T. BUTLER, ROBERT  
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PUGLIA, RICHARD SCHAUER, ROBERT S. THOMPSON,  
EDWARD J. WALLIN, AND GEORGE N. ZENOVICH  
IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE*<sup>1</sup>

With the consent of the parties pursuant to Rule 37 of the Rules of this Court, *amici curiae* submit this brief in support of respondent Lee Robbins. *Amici curiae* are

<sup>1</sup> Pursuant to Rule 37.6, this brief was written entirely by counsel for *amici curiae*, and no outside contributions were received for its preparation or submission.

retired justices of California's Supreme Court and Courts of Appeal. *Amici curiae* have a unique understanding of the manner in which the California appellate courts actually review appeals submitted on a no-merits brief and the consequences of those briefs on the appellate process. As retired justices, *amici curiae* have an interest and personal responsibility to make the appellate process meaningful and manageable, and to further the effective administration of justice.

### SUMMARY OF ARGUMENT

Under current California practice, counsel appointed to represent indigent defendants on appeal are permitted to file no-merit briefs (so-called "*Wende* briefs") which summarize the factual record but which do not call the reviewing court's attention to issues which might arguably support the appeal. In a *Wende* brief, counsel requests the appellate court to undertake its own independent review of the record. This no-merit procedure impacts the administration of the appellate courts in a number of ways.

- *First*, it requires the appellate court, already overburdened, to conduct an independent review of a cold record without the assistance of counsel who are likely to be more sensitive to what actually occurred at trial.

- *Second*, it requires the appellate court to duplicate counsel's efforts to identify arguable legal issues, and thus to expend greater judicial resources than might be necessary were the guidance of legal counsel provided.

- *Third*, it requires so little of counsel that it may actually encourage the filing of no-merit briefs.

Each of these consequences potentially impacts the fairness of the review process.

### ARGUMENT

**A. California's *Wende* procedure requires overburdened appellate courts to conduct an independent review of the entire record without the assistance of counsel.**

The workload facing California's intermediate appellate courts is very large. In fiscal year 1997-98, the 93 justices of the California Courts of Appeal each authored, on average, 146 opinions, with a high of 170 majority opinions per justice in California's Fourth Appellate District. See Judicial Council of California, Administrative Office of the Courts, 1999 Court Statistics Report, at 18 fig. 3 (1999). There were 7,993 criminal appeals during the same period, constituting half of all appeals filed. See *id.* at 26 tbl. 4. Over the ten-year period ending in fiscal year 1997-98, criminal appeals rose by nearly 30 percent. See *id.* The Warden estimates that as many as 20-24 percent of all opening briefs filed in criminal and juvenile appeals are so-called *Wende* briefs.<sup>2</sup> See Petition for Writ of Certiorari at 7.

The increasing caseload of California's Courts of Appeal requires effective methods of administration if all parties in all cases are to receive the fair and knowledgeable review to which they are entitled, and for which the California courts consistently strive. The *Wende* procedure aggravates the already heavy burden of the appellate caseload.

In *Anders v. California*, 386 U.S. 738, 744 (1967), this Court held that appointed counsel who believe their client's appeal is frivolous must provide the reviewing court with a brief "referring to anything in the record that might arguably support the appeal." This procedure was intended to facilitate the appellate court's own independent review of the trial court proceedings. See, e.g., *McCoy*

<sup>2</sup> *People v. Wende*, 25 Cal.3d 436, 600 P.2d 1071 (1979).



*v. Court of Appeals of Wis.*, 486 U.S. 432, 442 (1988); *Anders*, 386 U.S. at 744. Thus, for example, in *Penson v. Ohio*, 488 U.S. 75, 81 (1988), the Court noted that the "cold record" may not "accurately and unambiguously reflect all that occurred at the trial," which counsel may be in a better position to uncover. *Id.* at 82 n.5. By articulating the issues that might be explored, and identifying those portions of the record which relate to each issue, the no-merits brief can provide a starting point and structure for the court's analysis.

It is useful for defendant's legal counsel to perform this analysis because, among other reasons, that counsel either participated at trial or is likely to have access to trial counsel. Thus appellate counsel will either have, or can obtain, an understanding of the record which may be difficult to obtain from an unassisted review.

The procedure used by the California appellate courts is of far less assistance. A *Wende* brief, such as the one filed in this case, presents a factual summary of the defendant's case, accompanied by a request that the appellate court itself review the record for arguable issues. The California appellate court is thus left on its own to review the complete record, in what is essentially a vacuum, without any direction, let alone assistance of counsel.

The *Wende* brief that is the subject matter of the present proceeding illustrates the negligible guidance such briefs offer the reviewing court. The brief consisted of a statement of the case, setting forth the charge, the date of trial, the verdict and the sentence, followed by a six-page descriptive summary of the historical facts of the case. This summary defined no issues, cited no legal authority, and failed to present any legal analysis. A review of the summary provides little assistance. An appellate court that received this brief would have to start afresh,

reviewing the entirety of the record looking for objections or other error, and attempting to get a complete picture of the lower court proceedings to determine whether error, if any, was exacerbated or remedied as the trial progressed.

By requiring the appellate court to start its review *de novo*, there is an inherent risk that already overworked courts will be even further overburdened, with the consequence that not only the particular case in which the *Wende* brief has been filed, but all cases, will get less attention. There is also a risk that the review of the cold record will be more perfunctory without the issue-spotting guidance, and associated record citations, of counsel. It may be this feature of California's no-merits procedure which is reflected in a national survey in which all six California appellate districts reported that they devoted less time to *Wende* appeals than to the average case. See Martha C. Warner, *Anders in the Fifty States: Some Appellants 'Equal Protection is More Equal than Others'*, 23 Fla. St. U. L. Rev. 625 (1996).

The reality in California is that overworked appellate courts must decide a very high percentage of their docket from a cold record without the assistance of counsel. This may result in a defendant in a no-merits appeal receiving both less and more attention than he or she would were issues articulated—less because of the inertia inherent in requiring a court to inspect from scratch a possibly large and intimidating but cold record, and more because a meaningful review could be done more easily were the court to have available a brief that defined issues and cited the evidence related to those issues.

California's no-merits procedure burdens the appellate process in an additional way: It makes more difficult the court's determination of whether counsel "has provided

the client with a diligent and thorough search of the record for any arguable claim that might support the client's appeal." *McCoy*, 486 U.S. at 442; see also *Penson*, 488 U.S. at 82. The factual summary popular under *Wende* merely demonstrates to the court that counsel read through the record. It does not assist the court in determining whether counsel provided the minimum level of legal representation required by *Anders* and its progeny. Obviously, counsel must do more than gain a familiarity with the facts of the appellant's case. "The appellate lawyer must master the trial record, thoroughly research the law, and exercise judgment in identifying the arguments that may be advanced on appeal." *McCoy*, 486 U.S. at 438. A mere restatement of the facts of the appellant's case does not aid the reviewing court in deciding whether the appellant received the diligent and thorough assistance of appellate counsel.

**B. The *Wende* procedure requires a wasteful duplication of effort.**

When a California appellate court receives a *Wende* brief, it assigns the case to a staff attorney who prepares a memorandum analyzing all possible legal issues in the case. Typically, the staff attorney then makes an oral presentation to the appellate panel and explains whether the case presents any arguable issues for appeal. See J. Clarke Kelso, *Special Report on California Appellate Justice: A Report on the California Appellate System*, 45 Hastings L. J. 433, 461 (1994). Thus, as Professor J. Clarke Kelso remarked in a report prepared for California's Appellate Courts Committee, Commission on the Future of the Courts, "the *Wende* process duplicates in all relevant aspects the exact process that appellate counsel must follow in evaluating the merits of the case." *Id.*

Although the *Wende* procedure is capable of masking incompetent or slothful counsel, *amici curiae* are confident that a majority of appointed counsel who determine an appeal to be frivolous have come to this conclusion only after they have identified, explored, and researched all of the possible legal arguments they might raise on behalf of their clients. But this simply underscores the inefficiency of the *Wende* procedure. Because counsel provides no identification of issues—no memorialization of the issues diligently explored—the appellate court is forced to redo without guidance everything that defendant's counsel has already done, but at considerable additional cost.

This inefficiency is especially unfortunate in light of the considerable financial commitment California has made to provide appellate counsel for indigent defendants. In fiscal year 1996-97, the State of California budgeted over \$44 million for this purpose. See Judicial Council of California, Administrative Office of the Courts, 1998 Annual Report II, at 62 (1998). Regrettably, these funds result in minimal benefits for either defendants or the judicial system itself in appeals submitted by way of *Wende* briefs.

**C. By requiring too little of counsel, and too much of the reviewing court, California's procedure may encourage the filing of *Wende* briefs.**

One purpose of the *Anders* brief is to discourage the filing of no-merit briefs in cases where counsel could, in good conscience, file a brief on the merits. By requiring counsel to refer to anything in the record arguably supporting the appeal, "the temptation to discharge an obligation in summary fashion is avoided." *Penson*, 488 U.S. at 82 n.4. The *Anders* brief imposes a certain measure of discipline on counsel. Indigent defendants' right to counsel on appeal is thereby advanced and more cases can be reviewed in the traditional manner.



In contrast, the available evidence suggests that California's *Wende* procedure may encourage the filing of no-merit appeals. According to a survey of states' *Anders* procedures, the three states that do not require counsel to reference arguable issues in their no-merit briefs—California, Arizona<sup>3</sup> and Oregon<sup>4</sup>—had a greater percentage of no-merit appeals than states strictly complying with *Anders*. The survey, based on 1993-94 data, found that those three states heard a total of 12,964 criminal appeals, of which 17.5% (2271 cases) were no-merit appeals.<sup>5</sup> See Martha C. Warner, *Anders in the Fifty States: Some Appellants 'Equal Protection is More Equal than Others'*, 23 Fla. St. U. L. Rev. 625 (1996). In contrast, among the states following *Anders*, the average rate of no-merit appeals is only 8.5% (4577 *Anders* briefs filed in a total of 53,862 criminal appeals).<sup>6</sup> *Id.* While this survey reveals wide variations in the rate of no-merit appeals between states strictly complying with *Anders*—in fact, in some cases, there are wide variations between

<sup>3</sup> See *State v. Clark*, No. ICA-CR 97-0673, 287 Ariz. Adv. Rep. 7, 8 n.1, 1999 WL 16739 (Ariz. Ct. App. Jan. 19, 1999); *State v. Scott*, 1999 WL 551, 555 n.4 (Ariz. Ct. App. 1996).

<sup>4</sup> See *State v. Balfour*, 814 P.2d 1069, 1079-80 (Or. 1991).

<sup>5</sup> These figures may be higher today. In its *amicus* brief on behalf of respondent, Arizona notes that now more than 20% of all criminal appeals in the state are *Anders* cases. See Brief of Amici Curiae States of Arizona, *et al.* in Support of Petitioner at 14. California intimates that its own rate of *Wende* appeals may now be as high as 20-24 percent. See Petition for Writ of Certiorari at 7.

<sup>6</sup> This figure excludes those states that have adopted a formal or informal policy against the filing of *Anders* briefs, where counsel instead presents a brief on the merits even if counsel believes the appeal is frivolous. These states are: Alaska, Colorado, Georgia, Hawaii, Idaho, Indiana, Kansas, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, and North Dakota. Warner, *supra*, 23 Fla. St. U. L. Rev. at 643-51.

appellate districts within the same state—the general trend appears to support the assumptions this Court made in *Penson*: the requirements of the *Anders* brief encourage counsel to search the record more diligently for issues that can be argued on the merits.

### CONCLUSION

Given the current caseload of the California Courts of Appeal, and the diseconomies inherent in the *Wende* procedure, the judicial process, as well as fairness, would be better served by requiring counsel to identify the issues explored as well as the record citations relating to those issues. Diligent counsel will have already performed (and will have been compensated for) the task reassigned to the reviewing court. Moreover, by making it too easy for counsel to submit no-merit briefs, California's *Wende* procedure may result in fewer legitimate briefs on the merits reaching the courts.

Respectfully submitted,

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